No. 14,197

IN THE

United States

Court of Appeals

For the Ninth Circuit

W. O. BEDAL,

Appellant,

vs.

THE HALLACK AND HOWARD LUMBER COMPANY, a corporation,

Appellee,

and

W. O. BEDAL,

Appellant,

vs.

OREGON SHORT LINE RAILROAD COMPANY, a corporation, and UNION PACIFIC RAILROAD COMPANY, a corporation,

Appellees.

Appeals from the United States District Court for the District of Idaho.

REPLY BRIEF OF APPELLEE, THE HALLACK AND HOWARD LUMBER COMPANY

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I

STATEMENT OF THE CASE

Appellant, W. O. Bedal, is a Third-Party Defendant, an independent logging contractor, who, in unloading logs as such for Appellee, The Hallack and

Howard Lumber Company, caused injuries to an employe of Appellees, Oregon Short Line Railroad Company and Union Pacific Railroad Company, who, upon judgment being rendered premised upon the negligence of said Bedal, in favor of such employee and against them, brought this action of indemnity against Appellee, The Hallack and Howard Lumber Company, which in turn made said Bedal a Third-Party Defendant as its indemnitor and the original wrong-doer and the only active participant causing such injuries, whose negligence had been adjudicated, and therefore, he should respond in full for the judgment that has been rendered in this case against Appellee, The Hallack and Howard Lumber Company.

Hereinafter in this brief the Appellees, Oregon Short Line Railroad Company, a corporation, and Union Pacific Railroad Company, a corporation, will be referred to as 'Railroads', and Appellee, The Hallack and Howard Lumber Company, a corporation, will be referred to as 'Lumber Company', and W. O. Bedal, Appellant, will be referred to either as 'Appellant' or 'Bedal.'

On March 3, 1944, the Railroads entered into a lease with the Lumber Company for a log loading site at Banks, Idaho (R. 10), which lease contained the usual indemnity agreement on the part of Lessee. On March 31, 1945, the Lumber Company entered into a logging contract with the Appellant and Owen S. Smith (R. 27, ex. 8) which contract was amended from time to time and finally Appellant was substituted for and in place of himself and Owen S. Smith

(R. 47). The logging contract contained an indemnity agreement which will hereinafter be set out in full.

On September 15, 1949, while the lease from the Railroads to the Logging Company and the logging contract between the Lumber Company and Appellant were in full force and effect, A. M. Powell a car inspector employed by the Railroads was seriously injured by a slab or splinter flying from a log being unloaded by Appellant and striking said Powell, which later resulted in a judgment in favor of Powell and against the Railroads, which the Railroads paid.

Thereupon this action was instituted by the Railroads against the Lumber Company, and the Lumber Company, under Rule 14, brought Bedal into the case as a Third-Party Defendant. In its Third-Party complaint, and particularly in paragraph X thereof, the Lumber Company charged as follows:

> "That on or about the 13th day of April, 1950, the said A. M. Powell, by an instrument in writing, notified this Defendant and Third-Party Plaintiff about his said claim against the Union Pacific Railroad Company and this Third-Party Plaintiff arising out of the facts set forth above herein.
>
> "That on April 24, 1950, this Defendant and Third-Party Plaintiff, by letter, notified the said W. O. Bedal, the Third-Party Defendant, that it had received the written claim from the said A. M. Powell, and at that time forwarded to the said W. O. Bedal a copy of the claim asserted by the said A. M. Powell.

"That on or about the 3rd day of October, 1950, the said A. M. Powell filed the action in the United States District Court, for the District of Idaho, Southern Division, referred to in the complaint of the Plaintiffs in this action.

"That on or about January 10, 1951, this Defendant and Third-Party Plaintiff, in writing, by registered mail, notified the said W. O. Bedal, the Third-Party Defendant, of the filing of said complaint by the said A. M. Powell, and enclosed therewith a copy of the said complaint filed by the said A. M. Powell, and at that time and in that manner notified the said Third-Party Defendant, W. O. Bedal, among other things, as follows:

> " 'This letter is to advise you that the Hallack and Howard Lumber Company will look to you and your insurance carrier to hold harmless the Hallack and Howard Lumber Company from any liability whatever in this matter.'

all of which more fully appears from a copy of that certain letter from the Attorneys for the Defendant and Third-Party Plaintiff, Messrs. Phelps & Phelps, Denver, Colorado, who, at the time, were acting for this Defendant and Third-Party Plaintiff, a copy of which letter is hereto attached and marked Exhibit 'F,' and by this reference is hereby made a part hereof. (For letter see R. 52-53.)

"That the said W. O. Bedal, the Third-Party Defendant, failed and refused to defend the case of A. M. Powell against the Union Pacific Railroad Company, and failed and refused to pay the claim of the said A. M. Powell, and has failed and refused to hold this Third-Party Plaintiff harmless.

"That the said cause of A. M. Powell, Plaintiff, versus the Union Pacific Railroad Company, Defendant, was tried in the above-entitled Court before the Court and jury commencing on the 26th day of February, 1951." (R. 62-63)

Thereafter, the Appellant answered said Third-Party Complaint and admitted each and every of the above-named allegations.

In paragraph IX of its Third-Party Complaint the Lumber Company charged as follows:

"That this Defendant and Third-Party Plaintiff on October 14, 1952, by an instrument in writing, tendered the defense of this action to the said W. O. Bedal, and his insurance carrier, the Truck Insurance Exchange, and they severally refused to defend it; that a copy of said tender is attached hereto as Exhibit 'E'." (R. 23) (For letter see R. 49-51.)

and this was likewise admitted.

In his answer to the Third-Party Complaint Appellant stated:

> "In answer to paragraph IV of said Third-Party Complaint Third-Party Defendant admits that he was operating under said contract as an independent contractor;" (R. 75)

A request for admission was served on Bedal (R. 155) and Bedal admitted:

> "That the injuries to the said A. M. Powell at Banks, Idaho, on the 15th day of September, 1949, were caused by a piece of timber which broke off one of the logs being unloaded on or onto the leased premises." (R. 155-156)

Bedal also admitted:

> "Admits that W. O. Bedal, his agents, servants and employees were unloading logs onto or toward the premises covered by Exhibit 'A' attached to the complaint, and near the place where A. M. Powell was injured; admits that the unloading of said logs was for the use and benefit of Hallack and Howard Lumber Company—all pursuant to the contract which is attached to Third-Party Complaint;" (R. 159)

After the jury had returned a verdict in favor of A. M. Powell and against the Railroads the Railroads made a Motion for Judgment Notwithstanding the Verdict (R. 136-140; ex. 2), and in ruling on that Motion in the case of Powell vs. Railroads the District Judge ruled as follows:

"Defendant's motion for Judgment Notwithstanding the Verdict having heretofore been presented to the Court on oral argument of counsel for the respective parties and the matter having been taken under advisement by the Court and the Court having carefully reviewed the evidence submitted at the trial in order to determine whether the evidence of negligence was sufficient to justify the Court in submitting the case to the jury, finds: according to the testimony the plaintiff was struck by a slab from a log being unloaded from a truck on a road some twenty feet above the location of the bunkers where the logs were loaded on the train. A 'Cat' and Boom was used, a line placed underneath the logs and they were pushed off the truck and would fall down a steep incline unrestrained a distance of about twenty feet. Where they were pushed from the truck the incline was so steep that they fell through the air a distance of about twelve feet before they hit the ground and then rolled on the balance of the distance to the Bunker. The Slab that caused the injury to the plaintiff broke off one of those logs and was thrown through the air and, no doubt, was caused to break from the log because of the force of the drop.

"Whether the operation in driving the trucks to the top of this steep embankment, pushing the logs from the truck and allowing them to descend this steep incline to the track was negligence was a question for the jury.

> "If there is a reasonable basis in the record for concluding that there was negligence of the employer which caused the injury it would be an invasion of the jury's function by this Court to draw a contrary inference or to conclude that a different conclusion would be more reasonable (Ellis vs. Union Pacific Railroad Company, 329 U. S. 649)." (R. 141-142)

On September 22, 1953, the Railroads filed Findings of Fact and Conclusions of Law (R. 92). These Findings and Conclusions were later amended by Order of the Court (R. 112-113), and instead of reading as they do in the printed transcript of record, Finding No. III should read as follows:

> "That on the 15th day of September, 1949, the aforesaid lease agreement was in full force and effect, and that at Banks, Idaho, on said date, while the defendant, *by and through, W. O. Bedal, an independent contractor, his* agents, servants or employees were unloading logs on or onto said leased premises and using and occupying said premises in accordance with the terms and conditions of said lease a piece of timber broke off one of the logs being unloaded from a truck and struck one, A. M. Powell, a car inspector employed by the Union Pacific Railroad Company, seriously injuring the said A. M. Powell." (R. 112-113)

Likewise, in Finding No. XI (R. 97), as amended by order of the Court, in the eleventh line thereof in

the printed record the word 'agent' was stricken, and in lieu thereof, the words 'independent contractor' were inserted; and likewise, in Finding No. XI (R. 97), in the eighth line from the bottom of the page of the printed record (R. 97), the word 'its' was stricken, and in lieu thereof, the words "by and through W. O. Bedal, his" was inserted; so that, as amended by order of the Court, Finding No. XI (R. 97) should read as follows:

> "That the plaintiffs or either of them had no duties to perform in connection with either the unloading or the loading of logs at Banks, Idaho, and at the time and place Powell was injured were performing no part of the work of unloading or of loading the said logs. That the unloading of the logs onto said leased premises and the loading of said logs from said leased premises onto the cars of the plaintiffs were performed solely and entirely by the defendant The Hallack and Howard Lumber Comppany by and through its *independent contractor*, the said W. O. Bedal. That the said Union Pacific Railroad Company was held liable for the injuries sustained by the said A. M. Powell only because it had not furnished Powell a safe place within which to perform his work, a duty which was nondelegable as between the Union Pacific Railroad Company and the said Powell. That the said unsafe place was created by the fault or negligence of the defendant The Hallack and Howard Lumber Company, *by and through*

W. O. Bedal, his agents, servants or employees, and the said Union Pacific Railroad Company was guilty of no active negligence; *that the active, direct, proximate and primary cause of said Powell's injuries* was that of the defendant The Hallack and Howard Lumber Company acting by and through its agent, the said W. O. Bedal, in unloading said logs in the manner and under the circumstances hereinbefore referred to." (Emphasis ours.)

At the time of the trial of this case, U. R. Armstrong was called as a witness for Hallack and Howard, and testified that he had been General Manager for Hallack and Howard for 39 years; that he had charge of the company's operations at Cascade, Idaho, in 1949; that Hallack and Howard had entered into a logging contract, which was identified and admitted in evidence as Exhibit 8; that certain bunkers at Banks, Idaho, were put in by Bedal; that Hallack and Howard had nothing whatever to do with the installation of the bunkers; that during 1949 Hallack and Howard had nothing to do with the loading or unloading of logs at the Banks landing; that Bedal had the function of loading and unloading the logs; that Bedal cut the logs in the forest, loaded those logs on trucks, and brought them to the log landing at Banks, Idaho, and that Hallack and Howard did not take any part in the loading or unloading of the logs at Banks in September 1949; that Hallack and Howard did not employ any of the men working there; that Hallack and Howard had

nothing to do with the employees of the logging contractor, the Third-Party Defendant Bedal, and nothing to do with the logging operation at Banks in September 1949 (R. 236-240).

The above evidence was undisputed and uncontradicted and Appellant Bedal did not place any witness on the stand to testify in regard to this matter and made no offer of proof of any kind or character.

Appellant, when brought in as a Third-Party Defendent, filed an answer to the complaint of the Railroads in this action (R. 72-74), and at the trial of the instant case Appellant appeared and was represented throughout said trial by his Attorneys and cross-examined one witness (R. 171-172), and in the case of the Railroads against the Lumber Company Appellant offered no evidence (R. 234).

In the case of the Lumber Company against Bedal it was stipulated that Mr. L. H. Anderson, who was counsel for the Railroads in the case of Powell vs. Railroads, and had charge of the litigation, if called upon to testify, would testify as follows:

> "That he would testify that in the Powell case, he at that time was counsel for the defendant and that he had charge of the litigation and that if either Bedal or his insurance carrier or anyone else on his behalf had offered to take over the defense or to assist in the same that Mr. Anderson and his client would have accepted such defense or assistance." (R. 236)

When the Lumber Company called Mr. U. R. Armstrong to testify as hereinbefore set forth, Coun-

sel for Appellant attempted to go into matters that were foreign to the direct testimony given by Mr. Armstrong, to which there was an objection made on the ground that the question embraced matters which were not proper cross-examination, and the Court ruled it was inadmissable for, among other reasons, it was not proper cross-examination (R. 240), and without producing a single witness or offering any testimony other than that which was in the record in the Powell case, the Appellant rested (R. 241).

In directing the verdict in favor of the Lumber Company the District Judge said:

> "Had it not been for the Act of Congress known as the Railroad Employees Liability Act, this action originally no doubt, would not have been filed against the Union Pacific Railroad Company, it would probably have been filed didectly against W. O. Bedal the independent contractor who caused the injury. His conduct, in view of the fact that he was the acting party throughout this entire case although it isn't a case of estoppel under the law, it is a case of equity or equitable estoppel at least, because he sat idly by and let the party whom he was doing the work for, the Hallack & Howard Lumber Company become liable here. The only innocent party that there is to this lawsuit is the Hallack & Howard Lumber Company, and they are the ones who were responsible to the Railroad Company and the Railroad Company was

liable and the jury in the case that was tried heretofore found that this was an act of negligence and brought in a verdict against the Union Pacific Railroad Company. Should W. O. Bedal after all these proceedings be allowed to gamble on another jury's verdict which may be different from the jury's verdict already returned in this Court. The first jury found that it was negligence to drop these logs off and let them roll down this hill unrestrained as they were, which caused the slab to break off, which injured Powell. It would be a mockery on (106) justice to say that W. O. Bedal, who rolled that log off and caused this injury could come back here and gamble with another jury, and sit idly by and let Hallack & Howard become liable for his acts, and then say that there must be another ajudication.

"This has been a very difficult matter for the Court, I felt that in rendering judgment of $18,334.15 against Hallack & Howard Lumber, that it was an injustice but they had signed a contract to the effect that they would protect the Railroad Company and I found it necessary under the law to do that, * * *" (R. pp. 253-254-255)

II

POINTS AND SUMMARY OF ARGUMENT

A. Bedal in handling logs as an independent contractor for Lumber Company, injured Powell, an employee of Railroads, on their premises leased by Lumber Company, but under exclusive control of Bedal, whose conduct and acts were the sole cause of such injury, and Bedal must therefore ultimately respond for the same.

B. In Powell's suit against Railroads, based on non-delegable duty as a passive participant, there were no allegations nor proof of any acts or conduct upon which any liability or negligence could be, or was, based, other than that of Bedal who was the sole wrong-doer.

C. Bedal had knowledge of the Powell suit, refused to defend it, and is, therefore, bound by all facts necessary to the finding of the jury and Court of negligence in the handling of the logs involved, and is not entitled to relitigate such facts, especially inasmuch as Bedal offered no proof in the case at bar additional to that in the Powell case, and that the Court in this case also tried the Powell case and upon the same evidence held that Bedal had been negligent as found by the jury.

D. The Railroads recovered in this suit against the Lumber Company for whom Bedal was an independent logging contractor not only on an express indemnity, but also upon implied indemnity in that Lumber Company also had a non-delegable duty, and although a passive participant, was liable over as an indemnitor in equity.

E. Inasmuch as Bedal, as the independent logging contractor of Lumber Company, had complete and exclusive control of the operations of handling the logs involved, and in view of the potential danger and possible liability involved, it was not only natural, but necessary that Lumber Company take from Bedal an express indemnity agreement, which it did, specifically providing that under no circumstances or conditions should the Lumber Company be liable for any claims whatsoever incurred by Bedal, and hence Bedal was obligated to indemnify the Lumber Company against the judgment in favor of Railroads.

F. The Lumber Company is the only innocent party—not even a passive participant, excepting only insofar as Bedal was its independent contractor—and there is an implied indemnity on the part of Bedal to indemnify Lumber Company against the judgment against it, premised upon the principle that everyone is responsible for the consequences of his own wrong, and in equity and in good conscience, since judgment was rendered against the Lumber Company on account of the wrong of Bedal, the latter received a benefit at the expense of the former, the retention of which is unjust.

G. The rulings of the trial Court are amply sustained by the evidence, and the Scintilla of Evidence rule is not applicable in the Federal Courts; it is well established that where the trial Court would be compelled to set aside an adverse verdict, it was its duty to grant a motion for a directed verdict.

H. The Powell case conclusively established the negligence of Bedal as the sole, active cause of the injury to Powell, and Bedal, having refused to defend the same, is bound thereby as if he had been a party thereto, there being no allegations or proof in said case of any acts or conduct other than those of Bedal upon which a judgment could be, or was, based, and such facts being essential prerequisites to the judgment against the Railroads, therefore Lumber Company is entitled to liability over as to Bedal.

I. The rule of implied indemnity is in full force and effect in Idaho and has been sustained by this and other Courts premised upon the principle that everyone is responsible for the consequences of his own wrong and if another is held legally liable, regardless of the basis of such liability, and compelled to pay that which the wrong-doer should have paid, the latter becomes liable to the former.

J. As the trial Court found, the Lumber Company is the only innocent party to the action and should not be compelled to pay for the wrong of Bedal; and when the acts and conduct of said Bedal were adjudicated in the Powell case as the sole and active negligence of Bedal, he cannot again re-litigate the same merely by asking to have another jury pass on the same evidence that was before the first jury in the Powell case, which found Bedal negligent, particularly where the Court would have had to hold again as it did in the Powell case that the only primary and active negligence was that of Bedal; accordingly, Bedal must ultimately pay for injury to Powell and be liable over to the Lumber Company for the judgment against it by the Railroads herein.

K. Since Bedal has admitted that he 'failed and refused' to defend the Powell case no tender was necessary.

III

ARGUMENT

A. APPELLANT BEDAL IS LIABLE TO APPELLEE LUMBER COMPANY BY REASON OF HIS CONTRACT OF INDEMNITY.

We urge that the judgment secured by the Lumber Company should be sustained by reason of the indemnity agreement contained in the logging con-

tract (Ex. 8; R. 27-48). In said logging contract it was agreed as follows:

> "It is further stipulated and agreed that under no circumstances or conditions is the party of the first part (Lumber Company) to become liable for any claims whatsoever which may be incurred by the parties of the second part (Bedal) or any of their agents, servants or employees in carrying out this contract, and under no circumstances shall this agreement be considered as a partnership agreement, nor shall the parties of the second part (Bedal) be considered by this contract, or any interpretation thereof, to be the agents of the first party, (Lumber Company) and it is understood and agreed that this is what is commonly termed and called an independent contractor's agreement." (R. 33)

and said logging contract further provided:

> "Second parties (Bedal) further agree that all trucks and drivers are to be covered by insurance to take care of public liability and property damage, said insurance to specifically name and protect said first party (Lumber Company) in case of possible accident involving persons or property not connected with or owned by the parties to this contract. Second parties (Bedal) further agree that the use of their trucks on the public roads shall be in strict compliance with the state regulations governing such use,

and will at their own expense provide each truck with all equipment for safe operation and comply with all the rules and regulations of the United States and the State of Idaho, and any and all rules and regulations promulgated by said United States or the State of Idaho or any bureau or agency thereof." (R. 35-36)

The logging contract also provided that Bedal should carry workmen's compensation as follows:

> "The parties of the second part (Bedal) agree to procure in a manner satisfactory to the officers of the State of Idaho having charge of the administration of the Workmen's Compensation Act, workmen's compensation for all of his (Bedal's) employees to be employed in said logging operations, and also to comply fully with all federal and state laws, rules and regulations regarding compensation of employees."

The contract also provided that Bedal should keep all roads in repair; the provision being:

> "Second parties (Bedal) further agree to do all necessary work in building roads and bridges and keeping roads in repair;"

It likewise provided for strict performance thereof by Bedal:

> "It is hereby stipulated and agreed that a strict performance of the terms of this contract by the parties of the second part (Bedal), in

> the time and in the manner and in the method hereinbefore specified is of great importance to the first party (Lumber Company),"

In considering the above provisions it must be kept in mind that the Lumber Company was in no manner responsible for the injury suffered by Powell, nor is there any question but that Bedal was notified of all the steps taken by A. M. Powell. The lower court reviewed these facts in its opinion directing a verdict against Bedal (R. 248-255) and referred to the above quoted stipulations, and then in referring to the contract between the Lumber Company and Bedal, said:

> "Under the terms and provisions of this contract W. O. Bedal was an independent contractor and had charge and control of the premises in question here which was leased by the Union Pacific to Hallack and Howard Lumber Company and it was while the Third party defendant, W. O. Bedal, was unloading logs onto and using and occupying said leased premises under the terms and conditions of the logging contract between him and the Hallack & Howard Lumber Company that the said Powell was injured." (R. 251)

and the Court then recited the various steps which had been taken in keeping Appellant Bedal advised of the claim that was being asserted by A. M. Powell, and then stated:

> "The only innocent party that there is to this lawsuit is the Hallack & Howard Lumber Company," (R. 254)

and likewise stated:

> "It would be a mockery on justice to say that W. O. Bedal, who rolled that log off and caused this injury could come back here and gamble with another jury, and sit idly by and let Hallack & Howard become liable for his acts, and then say that there must be another adjudication." (R. 254)

and the Court also said:

> "This has been a very difficult matter for the Court, I felt that in rendering judgment of $18,-334.15 against Hallack & Howard Lumber, that it was an injustice but they had signed a contract to the effect that they would protect the Railroad Company and I found it necessary under the law to do that, * * *" (R. 254-255)

Counsel for Bedal accepts the general rule of law that a principal is not liable for the acts of an independent contractor, for on page 44 of Appellant's brief, counsel states:

> "(Appellant would like to mention the general principle of law that a principal is not liable for the negligent acts of an independent contractor. This is such a common principle that appel-

> lant does not think it necessary to do other than refer to it. 27 Am. Jur. 504, Sec. 27.)"

Since the above statement is true, what possibly could have been the purpose of inserting in the logging contract the provision for indemnity above quoted?

It will be noted that it was agreed:

> "that under no circumstances or conditions"

was the Lumber Company:

> "to become liable for any claims whatsoever which may be incurred by the parties of the SECOND part. (Bedal)"

Manifestly, the word 'claims' as used in the above indemnity agreement was broad enough to include a contract liability. Likewise, it will be noted that in reference to *claims* the parties used the words "which may be incurred" and the use of the word *incurred* by the parties rendered the clause unambiguous and definitely applicable to *any and all liability, including a contract liability!*

In *Boise Development Co. Ltd. vs. Boise City*, 26 Idaho 347, 143 Pac. 531, the Supreme Court of Idaho said:

> "However, this is unimportant from our viewpoint, because we are not passing upon whether this is a favorable deal for the city, but the question is: Did it incur a debt or liabil-

ity when it executed the same? And we submit that under a fair and reasonable construction of said section of our constitution, it did. If an agreement to perform this vast amount of work does not incur a liability on the part of the city, then the words 'incur' and 'liability' must each be given meanings unknown to lexicographers.

"Black's Law Dictionary, 2d edition, defines the word 'incur' as follows: 'Incur. Men contract debts; they incur liabilities. In the one case they act affirmatively; in the other, the liability is incurred or cast upon them by an act or operation of law.' Bouvier, in his law Dictionary, defines the word 'liability' as follows: 'Responsibility. The state of one who is bound in law and justice to do something which may be enforced by action. This liability may arise from contracts either express or implied, or in consequence of torts committed. The state of being bound or obliged in law or justice.' "

Boise Development Co., Ltd. vs. Boise City, 26 Ida. 347; 143 Pac. 531.

In the case of *Schwab vs. Schlumberger Well Surveying Corp.*, 168 ALR (Tex) 1074, the Court said:

"The word 'incur' is defined in Ashe vs. Youngst, 68 Tex. 123, 125, 3 SW 454, 455, as 'Brought on,' 'occasioned,' or 'caused.' "

Such definitions of the word 'incur' are common in that even *Webster's Dictionary* defines the same

as: "To become liable, or subject to; to bring down upon oneself." See, also footnote 6 in the case of *Orenberg vs. Thecker*, 143 Fed. (2d) 375, where the word 'claim' is defined:

> " 'Claim' in its primary meaning, is used to indicate the assertion of an existing right."

Here we have an independent contractor entering into a contract to cut, transport and load on railroad cars certain logs; this is known to be a hazardous undertaking and it was quite natural that the Lumber Company—not having control of the operations, and not hiring any of the employees, and not having the right to discharge the same—would desire an indemnity agreement, and that is the reason the above clauses were inserted in the contract; and, furthermore, that is the reason the Lumber Company required Bedal to insure all trucks and drivers to take care of public liability and property damage, the said insurance to specifically name and protect the Lumber Company in case of a possible accident involving persons or property not connected with or owned by either of the Parties. Now, however, the Lumber Company has had a judgment rendered against it for $18,334.15 (R. 103-104) because of an accident suffered by one A. M. Powell, and the sole question of construction is, what was the intention of the Parties when they inserted in the above contract the above quoted provision? Obviously, it was to protect the Lumber Company against the very situation that is now confronting it!

American Jurisprudence states as follows:

> "The interpretation of a contract is the determination of the meaning attached to the words 'Written or spoken' which make the contract. Rules for the interpretation of contracts are not inflexible, their purpose being to reach the probable intent of the parties. In the absence of a statute the only duty of the courts is to discover the meaning of a specific contract and to enforce it without a leaning in either direction when the parties stood on an equal footing and were free to do what they chose. The rules of interpretation are intended for persons of common understanding."
>
> 12 Am. Juris., Sec. 226, p. 745.

The same rule applies to an indemnity contract as is stated by *American Jurisprudence*:

> "While the construction of an indemnity contract may involve a question arising under circumstances calling for its submission to the jury, the question of construction is usually one of law for the court applying recognized rules of construction. The cardinal rule is to ascertain the intention of the parties and to give effect to that intention if it can be done consistently with legal principles. Contracts of indemnity, therefore, must receive a reasonable construction so as to carry out, rather than defeat, the purpose for which they were executed. To this end they should neither, on the one hand,

be so narrowly or technically interpreted as to frustrate their obvious design, nor, on the other hand, so loosely or inartificially as to relieve the obligor from a liability within the scope or spirit of their terms."

27 Am. Juris., Sec. 13, p. 462.

The Supreme Court of Idaho has said:

"The substantial intent of the parties governs in interpreting contracts and this is to be determined in view of the agreement as a whole, the matters with which it deals and the circumstances under which it was made."

Caldwell State Bank vs. First National Bank, 49 Ida. 110, at p. 116; 286 Pac. 360.

The Supreme Court of Idaho has also said:

"It is an established rule of law that the construction which sustains and vitalizes a contract is preferred, and should be adopted, rather than one which 'strikes down and paralyzes it'." (United States Fidelity & Guaranty Co. vs. Board of Commrs. of Woodson County, 145 Fed. 144, 76 CCA 114.)

The Court also quoted with approval from the *Woodson County* case the following:

" 'The actual intent and meaning of the parties, when the agreement was made, deduced from the entire contract, from its subject mat-

ter, from the purpose of its execution, and from the situation and circumstances of the parties when they made it, must prevail over the dry words of the instrument, inapt expressions, and careless recitals therein, unless the intention runs counter to the plain sense of the binding words of the agreement'." (United State Fidelity & Guaranty Co. vs. Board of Commrs. of Woodson County (Kan.), supra.)

City of Pocatello vs. Fargo, 41 Idaho 432, at 443; 242 Pac. 297.

In considering the indemnity agreement signed by Appellant it must be kept in mind that there is no rule of public policy which forbade the Lumber Company from contracting with Bedal for indemnity against any liability or damage it might suffer on account of his operations.

See: Buckeye Cotton Oil Co. vs. Louisville & N.R. Co., 24 Fed. (2d) 347 (6 CCA) 1928.

In commenting upon the indemnity agreement in the logging contract, the trial court said:

"The part of this that is so outstanding is 'that the second parties (Bedal) further agree that all trucks and drivers are to be covered by insurance to take care of public liability and property damage, said insurance to specifically name and protect said first party (Lumber Company) in case of possible accident involving

persons or property not connected with or owned by the parties to this contract'." (R. 251)

Here, the Lumber Company had a judgment entered against it because Powell was injured by a slab breaking off a log being unloaded by Bedal and flying through the air a distance of 60 or 70 feet.

Bedal, in his brief at page 82, argues that the Lumber Company is trying to take the words of the indemnity agreement in the logging contract and "so construe them as to protect the Lumber Company *from any loss it might sustain by reason of its separate arrangement with the Railroad,*" and then argues that the only protection the Lumber Company had was insurance protection under the policy to be taken out by Bedal.

There are several answers to this contention:

FIRST: The Railroads sued the Lumber Company, not only upon the contract contained in the lease, but alleged in its complaint that the Lumber Company was liable under the contract, "or independent of said lease" (R. 7), and in its conclusions of law the trial court concluded that the Lumber Company was liable to the Railroads under the lease (or independent of said Lease). This liability, independent of said lease, is based on the familiar doctrine of liability over.

SECOND: There is no exclusion of claims based upon a contract.

THIRD: The Lumber Company was to be protected "In case of possible accident involving persons or

property not connected with or owned by the parties to this contract."

FOURTH: Bedal was in control of the conditions under which the logs were cut, skidded, transported, unloaded, and loaded upon the railroad cars. He had control of the road and the place where the logs were unloaded.

Since Bedal did have such control and the Lumber Company had no control whatsoever over these conditions, it makes it reasonable that the indemnity provisions were inserted in the logging contract in order to have Bedal alone bear the loss, if any occurred.

Is it reasonable to assume that the Lumber Company would turn over all control to Bedal, as it did in this contract, without full and complete indemnity?

It must be kept in mind that the parties stipulated:

> "That a strict performance of the terms of this contract by the parties of the second part (Bedal) * * * is of great importance to the party of the first part (Lumber Company)."

It certainly is unreasonable to assume that the Lumber Company would turn over all these operations to Bedal without indemnity against "*all claims*" growing out of Bedal's operations over which it had no control.

To make such an assumption would do violence to the ordinary rules of self preservation, and it should not be assumed, and the contract should not be so

interpreted so as to make it possible for Bedal, by a single act of negligence on his part or on the part of his employees over whom the Lumber Company had no control, to wipe out the Lumber Company and leave Bedal and his Insurance Carrier go free!

We urge that the cases cited by Appellant (Br. 73-83) in support of Appellant's position that the indemnity agreement does not cover this situation and does not protect the Lumber Company are not in point here.

The first case cited by Appellant is that of *Crawford vs. Pope and Talbot, Inc.*, et al. 206 Fed. (2d) 784. In the first place, this was a case involving an *implied* indemnity, and the Court said:

> "Liability for indemnity as distinguished from contribution, may arise from the contractual relations of the employer with the third party."

and again:

> "The right to indemnity can, of course, arise by virtue of an express contract or such a right may be raised from the circumstances surrounding the contractual relationship between the employer and the third party."

Appellant, at page 76 of his brief, cites the case of *Smart, et al vs. Morard, et al.*, 124 NYS (2d) 634. In that case a third person sued an employer because of negligence of an employee in driving employer's automobile. The court held the employer could cross-

complain against the employee for indemnity, saying:

> "One liable only by reason of a duty imposed by law for consequences flowing from the negligent conduct of another, and not an actual participant in that conduct, may recover over against the active perpetrator of the wrong."

The above is a quote by the Court from *4 Shearman & Redfield*, Law of Negligence, para. 894, p. 2007 (1941 ed.).

Appellant, at page 78 of his brief, cites the case *of Employers Casualty Co. vs. Howard P. Foley Co., Inc.*, 158 Fed. (2d) 363, 364, and states that the Court was passing upon a provision of a lease as follows:

> "(2) Lessee hereby releases Lessor from any and all damages to both person and property and will hold the Lessor harmless from all such damages during the term of this lease."

This provision cannot be found in the opinion as the Court was, in fact, passing upon the following provision of an agreement:

> "Subcontractor shall save and hold harmless Contractor, Agent and Owner from and against all suits for claims that may be based upon any alleged injury (including death) to any person or damage to property that *may occur or that may be alleged to have occurred, in the course*

> *of the performance of this contract by Subcontractor*, whether such claim shall be made by an employee of a contractor or by a third person, and whether or not it shall be claimed that the alleged injury or damage was caused through a negligent act or omission of Subcontractor."

In the above case certain employees of subcontractor were injured on contractor's premises and recovered judgment therefor against the contractor, subcontractor and insurer. The only question determined by the Court was whether or not the injuries were sustained while the subcontractor was performing his contract. The Court held that they were not so sustained and denied indemnity to the contractor's insurer. No other question was decided.

Appellant at page 78 of his brief, cites the case of *Southern Railway Co. vs. Coca Cola Bottling Co.*, 145 Fed. (2d) 304, 307, wherein plaintiff railroad sought to recover as indemnitee certain damages paid by it to its employee. The last clause of the indemnity agreement provided:

> "* * * except that the Licensee (indemnitor) shall not be held responsible for any loss of life or personal injury, or damages to cars or property of the Railway Company, accruing from its own negligence, without fault of the Licensee, its servants or employees."

The Court held the injuries to the employee were the result of the indemnitee's own negligence and

were within the class expressly excepted in the last clause of the indemnity agreement.

Appellant at page 78 of his brief, cites the case of *Sinclair Prairie Oil Co. vs. Thornley* (10th Cir.) 127 Fed. (2d) 128, in which case an employee of an independent contractor was killed through negligence of the principal contractor. The Court was called upon to determine the legal effect of an agreement whereby the independent contractor agreed to carry Workmen's compensation and to assume responsibility for all such claims and to hold and save the principal free, clear and harmless therefrom. The Court said:

> "This is a provision generally found in such contracts, and the natural import thereof is that the contractor will so carry on his operations that no liability therefrom will attach to the other party."

and went on to hold that the indemnitor was not liable under the terms of the agreement, it not being clear that it had agreed to indemnify against the indemnitee's own negligence. Such is not the case here, for under no theory could the Lumber Company be charged with negligence which would defeat its right to indemnity.

Appellant at page 79 of his brief, cites the case of *Kay vs. Pennsylvania Railway Co.* 156 Ohio St. 503, 103 N.E. (2d) 751, which was an action for declaratory judgment as to whether an agreement executed by the purported indemnitor indemnified

the railroad for damages arising from maintenance of a drawbridge, on the theory of *ejusdem generis*. The Court held that no right to indemnity accrued for the reason that the subject-matter of the agreement (an unloading machine) was never constructed and the agreement was never operative.

Appellant at page 79 of his brief, cites the case of *Employer Liability Assurance Corp. vs. Post & McCord, Inc.*, 286 N.Y. 254, 36 N.E. (2d) 135, 139. In that case the Court of Appeals of N.Y. was called upon to construe a provision of a subcontract which provided that the contractor would indemnify the owner and manager against all claims, suits, damages and judgments to which the owner and/or managers may be subjected or suffer by reason of any injury to persons or property resulting from negligence or carelessness on the part of the contractor, its employees, or permitted subcontractors, in the performance of the agreement. The Court held that the contractor agreed only to respond for its own negligence—not the negligence of the indemnitee.

As we have seen, this question is not in issue in the present case.

Appellant also cites at page 79 of his brief, the case of *Halliburton Oil Well Cementing Co., et al vs. Paulk, et al.*, (C. A. 5th Cir.) 180 Fed. (2d) 79, 83, 84. In that case, the Court denied indemnity to a contractor for damages paid to an injured employee as the result of negligence of the contractor, stating that the terms of a work order to the effect that the contractor would not be responsible for damages or losses arising out of the work, could not be

construed as an agreement for indemnity against the acts of the indemnitee.

Again, we must conclude that none of the foregoing cases is in point in this appeal for under no theory can the Lumber Company be charged with negligence.

Appellant, at page 79 of his brief, relies upon the case of *Westinghouse Electric Elevator Co. vs. La-Salle Monroe Building Corp.*, 395 Ill. 429, 70 N.E. (2d) 604. In that case the injury complained of was solely the result of the indemnitee's negligence and the question was whether or not the indemnity contract could be construed as indemnifying one against his own negligence.

Quite properly the Court held that such a construction cannot be sustained in the absence of clear and explicit language in the contract.

At page 83 of his brief Appellant cites the case of *Burks vs. Aldridge*, 154 Kan. 730, 121 Pac. (2d) 276. This case was decided by the Supreme Court of Kansas under the Kansas Practice Act and not under Rule 14 which governs this case. In the *Burks* case the defendent was a contractor constructing a highway; he was sued for negligence and his insurance carrier was joined, and the Supreme Court of Kansas said:

> "As against the contractor the action was founded upon his alleged negligence. As against the appellant (Insurance Company) it was founded on the alleged contract of insurance. Ordinarily actions in tort and contract may not be joined."

The above rule is in force in many States because of the particular State statutes. This is true of the Idaho Practice Act, see:

> Section 5-606, Idaho Code;
> Stearns vs. Graves, 61 Idaho 232; 99 Pac. (2d) 955;

But the Rules of Civil Procedure are entirely different; for example, Rule II states:

> "There shall be one form of action to be known as a 'civil action'."

In a case decided by Judge Sullivan of the District Court for the Northern Division of Illinois, it is stated:

> "Objection is also made that the claim of liability on the part of the third party defendant arises on a contract which is separate and distinct from the cause of action forming the basis of plaintiff's suit."

The court, after quoting an authority, said:

> "This is the exact situation we have in the instant case. Counter claimants have set up by their counter claim a defense arising on a contract, while plaintiff's suit is on a negotiable instrument, but it should be borne in mind that in the federal courts we have but one form of action."

See:

United States vs. Pryor, 2 F.R.D. 382, at p. 387.

In another section of this brief we shall set forth the applicable equitable principles which are, that the economic loss should be finally visited upon the one whose negligence caused that loss, and we urge that in construing the indemnity agreement between the Lumber Company and Bedal these principles should also be kept in mind and that it should be the policy of the law that contracts should be so construed that right and justice shall prevail.

B. UNDER THE LAW OF IDAHO THE RULE AS TO IMPLIED INDEMNITY IS IN FULL FORCE AND EFFECT.

In an Idaho case in which an Express Company had placed its sign five feet ten inches above the sidewalk, and a passerby struck it and was injured, the general rule is stated by our Court:

> "While the city is liable in the first instance when it is negligent in such matters, the person or corporation that places such obstructions in or over the sidewalk or street is liable to the city for whatever damages it has to pay for such unlawful acts."
> Baillie vs. City of Wallace
>
> 24 Idaho 706, at p. 718, 135 Pac. 850.

C. THIS AND OTHER COURTS HAVE RECOGNIZED THE RULE OF IMPLIED INDEMNITY IN MANY CASES.

This Court in a recent case involving negligence by two parties, but where there was a direct active act of negligence on the part of one of the parties, this Court said:

> "The facts present the case fully within language used in the well known case of The Mars, D.C. S.D. N.Y. 1914, 9 Fd. (2d) 183, 184; 'It may be thought that this was a proper case for dividing damages. I think not. * * * I take it that the distinction there is this: Where two joint wrongdoers contribute simultaneously to any injury, then they share the damages; but where one of the wrongdoers completes his wrong, and the subsequent damages are due to an independent act of negligence, which supervenes in time, and which has as its basis a condition which has resulted from this first act of negligence, in that case they do not share; but in that case we say that the consequences of the first act of negligence did not include the consequences of the second.' The Restatement of Torts, Section 441, is to the same effect; '(2) The cases in which the effect of the operation of an intervening force may be important in determining whether the negligent actor is liable for another's harm are usually, but not exclusively, cases in which the actor's negligence has created a situation harmless unless something further occurs, but capable

of being made dangerous by the operation of some new force and in which the intervening forces makes a potentially dangerous situation injurious. In such cases the actor's negligence is often called passive negligence. While the third person's negligence, which sets the intervening force in active operation, is called active negligence.' "

United States vs. Rothschild International Stevedoring Co., (1950) 183 Fed. (2d) 181, at p. 182.

This entire matter was again exhaustively reviewed by this Court in the case of *Booth-Kelly Lumber Co. vs. Southern Pacific Co.*, 183 Fed. (2d) 902. In *Booth-Kelly* there was a written indemnity agreement, but it was necessary for this Court to review the rights and duties of the parties under the common law, and quotes at length from other cases where the Courts have held there is an implied indemnity agreement where two parties have been negligent, but one party was the direct cause of the injury; one quotation being on page 908 of 183 Fed. (2d) as follows:

"Of this class of cases is Washington Gaslight Co. vs. District of Columbia, 161 U.S. 316, 16 S. Ct. 564, 40 L. Ed. 712, in which a resident of the city of Washington had been injured by an open gas box, placed and maintained on the sidewalk by the gas company, for its benefit. The District was sued for damages, and, after notice to the gas company to appear and defend, damages

were awarded against the District, and it was held that there might be a recovery by the District against the gas company for the amount of damages which the former had been compelled to pay. Many of the cases were reviewed in the opinion of the court, and the general principle was recognized that, notwithstanding the negligence of one, for which he has been held to respond, he may recover against the principal delinquent where the offense did not involve moral turpitude, in which case there could be no recovery, but was merely *malum prohibitum*, and the law would inquire into the real delinquency of the parties, and place the ultimate liability upon him whose fault had been the primary cause of the injury.' "

This Court then stated:

"In the Washington Gas Co. case, supra, the court explained the rule there enforced by quoting as follows: 'In the leading case of Lowell vs. Boston & Lowell Railroad, 23 Pick. (Mass.) 24, 32, (34 Am. Dec. 33), the doctrine was thus stated: 'Our law, however, does not in every case disallow an action, by one wrongdoer against another, to recover damages incurred in consequence of their joint offense. The rule is, *in pari delicto potior est conditio defendantis.*' If the parties are not equally criminal, the principal delinquent may be held responsible to his co-delinquent for damages incurred by their joint

offense. In respect to offenses, in which is involved any moral delinquency or turpitude, all parties are deemed equally guilty, and courts will not inquire into their relative guilt. But where the offense is merely *malum prohibitum*, and is in no respect immoral, it is not against the policy of the law to inquire into the relative delinquency of the parties, and to administer justice between them, although both parties are wrongdoers'." (161 U.S. 316, 16 S. Ct. 564, 569.)

Booth-Kelly Lumber Co. vs. Southern Pacific Co. (1950) 183 Fed. 2d. 902, at pp. 908-909.

Professor Moore states:

"The third party's duty to indemnify the plaintiff need not, however, be based on contract, but may arise by operation of law. Thus, where the case is one of primary and secondary liability, the party secondarily liable may implead the one primarily liable.

"For example, where A.B. sued C.D. for injuries claimed to have resulted from the breaking of a hook being used by C.D., C.D. was allowed to implead E.F., the manufacturer of the hook. The Third Circuit has held that under Pennsylvania law a steamship corporation sued by a seaman for maintenance, cure, and wages could bring in and assert a claim over for recovery against a third party whose alleged negligence caused the plaintiff's injury. A third party may be impleaded in a tort action when its liability

to the original defendant is based on a breach of an express or implied warranty. In an action against a railroad to recover damages for death caused by a collision, defendant may bring in the crew of the train that allegedly caused the accident."

Vol. 3, (2d) Ed., Moore's Federal Practice, Sec. 14.10, pages 424-425.

In an action against a charterer for the death of a stevedore, and stevedoring company was brought in as a third-party defendant, the Court said:

"Nor is discussion required concerning the failure to plead a written contract of indemnity. One cannot be sure whether the Eleventh paragraph of the third party complaint, above quoted, is intended to assert an oblique reference to a written contract for its benefit, or otherwise; but the cases to which reference has been made clearly establish that no written contract need be relied upon to support the claim to indemnity; the obligation is described as an implied contract arising from undertakings implicit in the relationships assumed."

Corrao vs. Watermann SS Corporation (1948) 75 Fed. Supp. 482, at p. 485.

This rule is also discussed in *Corpus Juris Secundum*, where the leading sentence is:

"The obligation to indemnify may result from implied contract or may be imposed by law.

> Where one is compelled to pay what another in justice ought to pay, the former may recover from the latter the sums so paid, as where one is compelled to pay for injuries resulting from his acts done under the direction of another."
>
> 42 C. J. S., Sec. 20, p. 594.

and also:

> "One compelled to pay damages on account of the negligent or tortious act of another has a right of action against the later for indemnity."
>
> 42 C. J. S., Sec. 21, p. 596.

One of the leading cases on this matter is that of:

Bradley vs. Rosenthal, 154 Cal. 420, 97 Pac. 875.

See, also:

Fenley vs. Revel, 170 Kan. 705, 228 Pac. (2d) 905;
Jentick vs. Pacific Gas & Electric, 105 Pac. (2d) 1005;
Gardner vs. Marshall, 145 Pac. (2d) 678.
See notes in:
38 A. L. R., 572,
66 A. L. R., 1148.

The *Restatement of the Law of Restitution*, Para. 94, page 413, states as follows:

> "A person who has become liable in tort to another because of an injury caused by his neg-

ligent failure to protect the other's person or property from the tortious conduct of a third person is entitled to indemnity from such third person for expenditures properly made in the discharge of such liability, if the payor could have recovered from the third person for an injury so caused to himself or to his own property."

Corpus Juris states:

"Where one is compelled to pay money which in justice another ought to pay, the former may recover from the latter the sums so paid."

31 C. J. Sec. 46, page 446.

It doesn't matter whether the original duty is based on a contract (here the indemnity agreement of the Lumber Company with the Railroads) or grows out of wrongful acts (torts). In a case where a transferee of bank stock did not pay an assessment and was sued by the transferor, who had to pay, on an implied indemnity agreement, the New York Court of Appeals said:

"Here the plaintiff asserts a right of action based on a contract implied in law for moneys which his assignor was compelled to pay though it was the duty primarily of the defendant to make the payment.

"The general rule which must be applied where such a right of action is asserted has been firmly established by an almost unbroken line of judicial decisions and by academic authority. 'A per-

son who, in whole or in part, has discharged a duty which is owed by him but which as between himself and another should have been discharged by the other, is entitled to indemnity from the other, ... ' American Law Institute, Restatement of the Law of Restitution, sec. 76. Where payment by one person is compelled, which another should have made or which redounds solely to the benefit of another, a contract to reimburse or indemnify is implied by law."

Brown vs. Rosenbaum, 287 N.Y. 510, 41 N.E. (2d) 77, 141 ALR 1345, at p. 1349.

It will be noted that the case of *Burris vs. American Chicle Co.*, 120 Fed. (2d) 218, was decided by the Second Circuit Court of Appeals on May 26, 1941. Since that time apparently there has been a change in the attitude of this Court. Following the *Burris* case a number of District Courts in the Circuit held in accordance with the rule that in a suit over, the defense that the original plaintiff could not recover against the defendant over was not valid.

"Rederii vs. Jarka Corp., D.C. Me., 26 F. Supp. 304; The ampico, D.C. N.Y., 45 F. Supp. 174; The S.S. Samovar, D.C. Cal., 72 F. Supp. 574, 588; Portel vs. United States, D.C. N.Y., 85 F. Supp. 458, 462; Contra: Johnson vs. United States, D.C. Or., 79 F. Supp. 448; Frusteri vs. United States, D.C. N.Y., 76 F. Supp. 667; Calvino vs. Pan-Atlantic S. S. Corp., D.C. N.Y., 29 F. Supp. 1022."

American Mutual Liability Ins. Co. vs. Matthews, 182 Fed. (2d) 322, at p. 324.
(Foot note No. 2)

Other cases hold likewise:

"The Tampico, D.C., 45, F. Supp. 174; Sever vs. U.S., D.C., 69 F. Supp. 21; Brosnan vs. American President Lines, 1943, A.M.C. 526; Landgraf vs. U.S., D.C., 75 F. Supp. 58, 1947 A.M.C. 1539; LoBue vs. U.S., D.C., 75 F. Supp. 154, 1948 A.M.C. 116, 119; Coal Operators Casualty Co. vs. U.S., D.C., 76 F. Supp. 681, 1948 A.M.C. 127."

Johnson vs. United States, 79 Fed. Supp. 448
(Foot Note No. 1)

In *The Tampico*, 45 F. Supp. 174, New York, decided April 8, 1942, where a stevedore employed by Nicholson Transit Company, owner of The Tampico, was injured while he was engaged in the hold of a barge from which a cargo was being transferred to The Tampico, and sued the barge company charging it was defective and dangerous. The owner of the Tampico was impleaded upon the petition of the barge owner claiming contribution on the ground of negligence of The Tampico owner.

Under the Jones Act the fellow-servant rule was not available to the owner of the steamship; the steamship owner was under the Longshoremen's Act and was immune from suit by its employee.

The Court said:

"Nicholson having secured the payment to its employees of compensation under the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C.A. Sec. 901 et seq., is immune from suits for damages resulting from libellant's injuries brought by the libellant or anyone in his right, according to the provision of Section 905 of the Act. But the right in admiralty to contribution between wrongdoers does not stand on subrogation but arises directly from the tort. Erie R.R. Co. vs. Erie Transportation Co., supra, 204 U.S. page 226, 27 S. Ct. 246, 51 L. Ed. 450. The immunity given Nicholson by the statute from suits arising out of libellant's injuries furnishes no defense against Hedger's claim to contribution as between joint tort feasors. Briggs vs. Day, D. C., 21 F. 727, 730. In reason and principle decisions in collision cases, where under the Harter Act, 46 U.S.C.A. Sec. 192, the owner of a seaworthy vessel is relieved of liability to its own cargo, seem to point the way for upholding the right to contribution in the instant case. See Aktieselskabet cuzco vs. The Sucarseco et al, 294 U.S. 394, 400, 55 S. Ct. 567, 79 L. Ed. 942, and cases cited."

The Tampico, 45 Fed. Supp. 174, at pp. 175-176.

There are several State Court cases that should also be cited.

In *Kansas City & M. Ry. Co. vs. N.Y. Central H. R.R. Co.*, 163 S.W. 171 (Ark) the question arose be-

tween the initial carrier and the delivering carrier in connection with certain vinegar which was delivered by the delivering carrier without surrendering the bills of lading. The shipper, or consignor, recovered against the initial carrier, which, in turn, sued the delivering carrier through the act of which the loss occurred.

As a defense it was set up that the consignee was bankrupt; that the initial carrier had knowledge and refused to present its claim upon which he would have received a certain sum which should be offset; the Court held that the delivering carrier could have filed such a claim but the initial carrier could not, and, therefore, it was no defense.

The Supreme Court of the State of Washington held in the case of *Alaska Pac. S.S. Co. vs. Sperry Flour Co.*, 182 Pac. 634, that a judgment in an action by an injured servant against his master, and the owner of the premises on which the injury occurred, dismissing the action against the owner upon motion of the plaintiff, was not conclusive against the master in a subsequent action to recover from the owner the amount of the judgment against it. The Court held that the proceedings in the first action were conclusive as to certain facts, and said:

> "In view of the necessity of a new trial, we may say for the guidance of the trial court that we have examined into the error assigned upon instructions as to the force and effect of the judgment in the Egan case, and in view of the fact that appellant sought that dismissal voluntarily upon its own motion after the plain-

tiff's case had been presented to the jury, and after knowledge obtained from the pleadings of the fact that its codefendant claimed that it was responsible for the construction and maintenance of the plank approach, and notwithstanding the failure to at any time tender to it the defense of the action on behalf of the respondent, still the judgment was binding upon it in the four particulars named, i.e., it was proof that the plank approach was insecurely fastened, unsafe, and dangerous, that respondent was liable to Egan for the injuries received, that Egan was not guilty of contributory negligence, had not assumed the risk, and that no negligence of a fellow servant had intervened, and that Egan's damages were as shown by that judgment. Detroit vs. Grant, 135 Mich. 626, 98 N.W. 405; Chicago vs. Robbins, 2 Black. 418, 17 L. Ed. 298; Robbins vs. Chicago, 4 Wall. 657, 18 L. Ed. 427; Oceanic Steam Nav. Co. vs. Compania Transatlantic Espanola, 39 N. E. 360; Spokane vs. Crane Co., 98 Wash. 49, 167 Pac. 63; Bevan vs. Muir, 53 Wash. 54, 101 Pac. 485, 32 L.R.A. (N.S.) 588."

Alaska Pac. S.S. Co. vs. Sperry Flour Co., (Wash.), 182 Pac. 634, at p. 637.

The Circuit Court of Appeals for the Eighth Circuit on February 14, 1950, decided the case of *American District Telegraph Co. vs. Kittleson*, 179 Fed. (2d) 946. Kittleson was employed by Armour & Company; he was injured when an employee of the Tele-

graph Company fell through a skylight in the roof of the building where he was working; at the time the Telegraph Company was under contract to repair an automatic signal system in the building; the Telegraph Company filed a third-party complaint against Armour & Company; the third-party complaint was not for contribution but for indemnity and for judgment over against Armour, and the Court said:

> "The court stated the applicable Iowa law as follows 146 N.W. at page 854, quoting from Massachusetts cases: 'When two parties, acting together, commit an illegal or wrongful act, the party who is held responsible in damages for the act cannot have indemnity or contribution from the other, because both are equally culpable, or particeps criminis, and the damage results from their joint offense. This rule does not apply when one does the act or creates the nuisance, and the other does not join therein, but is thereby exposed to liability and suffers damage. He may recover from the party whose wrongful act has thus exposed him. In such cases the parties are not in *pari delicto* as to each other, though as to third persons either may be held liable'."

American District Telegraph Co. vs. Kittleson 179 Fed. (2d) 946.

See, also:

United States vs. Rothschild, 183 Fed. (2d) 181 (9th CCA).

In the case of *Westchester Lighting Co. vs. Westchester Co.*, (N.Y.) 15 N.E. (2d) 567, an employee of the Defendant negligently broke a gaspipe maintained by the Lighting Company and negligently enclosed the fracture within a tile drain with the result that gas escaped into a nearby house and killed another employee of Defendant in the course of his employment at the time. The only negligence of the Plaintiff Lighting Company was the failure to make timely discovery that the gas was escaping. The deceased's administratrix obtained judgment against the Plaintiff Lighting Company which was paid and suit for indemnity was brought against the Defendant Westchester Company.

The defense was that the Defendant had secured compensation for its employees under the Workmen's Compensation Law and hence, had the suit been brought originally by the administratrix against the Westchester Co., no recovery could have been had. The Court held:

> "Plaintiff asserts its own right of recovery for breach of an alleged independent duty or obligation owed to it by the Defendant."

The Court went on to say:

> "It is well established that a person guilty of negligence is liable not only to the person directly injured as a result of the negligent acts but is accountable to the person who is legally liable for the negligence and who has been compelled to respond to the injured person in damages. It

is not accurate to say that the basis of this liability is in contract. More aptly it may be said to be quasi-contractual. In Dunn vs. Uvalde Asphalt Paving Co., 175 N.Y. 214, 67 N.E. 439, this court said that '. . . . the wrongdoer stands in the relation of indemnitor to the person who has been held legally liable, and the right to indemnity rests upon the principle that every one is responsible for the consequences of his own wrong, and, if another person has been compelled to pay the damages which the wrongdoer should have paid, the latter becomes liable to the former.' Page 217, 67 N.E., page 439.

"In Oceanic Steam Navigation Co., Limited vs. Compania Transatlantica Espanola, 134 N.Y. 461, 31 N.E. 987, 30 Am. St. Rep. 685, the court said: 'The right to indemnity stands upon the principle that every one is responsible for the consequences of his own negligence, and, if another person has been compelled (by the judgment of a court having jurisdiction) to pay the damages which ought to have been paid by the wrongdoer, they may be recovered from him.' Page 468, 31 N.E. page 989. The rule is thus stated in the law of Quasi-Contracts by Woodward (259): 'But in some cases, as for example where the wrong consists of a mere unintentional neglect of duty, there can hardly be said to be an implication of a genuine promise of indemnity or contribution. In such cases, the obligation may well be rested upon quasi-contractual principles, for in so far as one tort feasor pays

> what in equity and good conscience another tort feasor ought to pay, the latter receives a benefit at the expense of the former, the retention of which is unjust'."
>
> Westchester Lighting Co. vs. Westchester Corp., (N.Y.) 15 N. E. 2d. 567.

In the case of *Aluminum Co. of America vs. Hully*, 200 F. (2d) 257, 8th Circuit, December 15, 1952, the Aluminum Company endeavored to offset an amount against the asbestos contractor, an amount which it had paid on account of injuries to an employee of the asbestos contractor. The employee was working on the Aluminum Company property, but at the time of injury he was not actually applying asbestos, but was moving out of reach of certain gases from a fluxing furnace.

The contract indemnified the Aluminum Company as to "personal injuries of employees of contractor arising out of or in any manner connected with the performance of this contract." The Court held:

> "The stipulated facts establish that the right and the only right or reason Barnes had to be in Alcoa's Remelt Building in proximity to its operations was to do his part in the performance of the contract. That is the purpose for which the contractor employed him there."

Then the question arose as to whether the employee was an invitee in the Aluminum Company factory. The Court held that had been adjudicated in the former action, saying:

"The adjudication in the Barnes case also settled against the contractor that Barnes was an invitee in the Alcoa factory at the time he was struck. He was an invitee on the premises solely by reason of his participation in the performance of the contract. It was adjudicated that his being where he was when he was struck was connected with the performance of the contract because he was acting to meet the emergency which confronted him while he was engaged in such performance. As the contractor had been given an opportunity to defend, the judgment in the Barnes action became conclusive upon the contractor as to facts determined therein which are essential to the judgment. Standard Oil Co. vs. Robbins Dry Dock & Repair Co., D.C. N.Y., 25 F. (2d) 339, affirmed 32 F. (2d) 182; B. Roth Tool Co. vs. New Amsterdam Casualty Co., 8 Cir., 161 F. 709; Citizens' Nat. Bank vs. City Nat. Bank, 111 Iowa 211, 82 N.W. 464; Hoskins vs. Hotel Randolph Co., 203 Iowa 1152, 211 N. W. 423, 65 A.L.R. 1125; 42 C.J.S., Indemnity, Sec. 32, pp. 613, 614. See also, Globe Indemnity Co. of New York vs. Banner Grain Co., 8 Cir., 90 F. (2d) 774; International Indemnity Co. vs. Steil, 8 Cir., 30 F. (2d) 654; Imperial Refining Co. vs. Kanotex Refining Co., 8 Cir., 29 F. (2d) 193."

In the case of *Barber S.S. Lines vs. Quinn Bros.*, 104 F. Supp. 78 (Mass.) February 29, 1952, the Court restated the rule as to implied indemnity as follows:

"Procedural distinctions aside, the substantive law as to implied contracts of indemnity is the same under the maritime law, the general federal law, the law of Massachusetts and the law of New York. The fundamental theory is that where a person has a non-delegable duty with respect to the condition of his premises or vessel but has made a contract with another to perform that duty, and the other performs it negligently so as to make the owner liable to a person later injured, then, as a matter of implied contract, the owner is entitled to restitution from the other for reasonable damages paid the injured person. Restatement, Restitution, Sec. 95; Geo. A. Fuller Co. vs. Otis Elevator Co., 245 U.S. 498, 38 S. Ct. 180, 62 L.Ed. 422 (law); Washington Gaslight Co. vs. Dist. of Columbia, 161 U.S. 316, 327-328, 16 S. Ct. 564, 40 L.Ed. 712 (law); Rich vs. United States, 2 Cir., 177 Fed. (2d) 688, 691 (admiralty) as explained in Slattery vs. Marra Bros., 2 Cir., 186 Fed. (2d) 134, 138; Burris vs. American Chicle Co., 2 Cir., 120 Fed. (2d) 218, 222 (law); Seaboard Stevedoring Corp. vs. Sagadahoc S.S. Co., 9 Cir., 32 Fed. (2d) 886 (law); The No. 34, 2 Cir., 25 Fed. (2d) 602, 604 (admiralty); Bethlehem Shipbuilding Corp., Ltd., vs. Joseph Gutradt Co., 9 Cir., 10 Fed. (2d) 769 (admiralty); Hollywood Barbecue Co., Inc. vs. Morse, 314 Mass. 232, 59 N.E. 657, 51 L.R.A. 781; Churchill vs. Holt, 127 Mass. 165; Westchester Lighting Co. vs. Westchester County Small Estates

Corp., 278 N.Y. 175, 15 N.E. (2d) 567; Oceanic Steamship Nav. Co. vs. Campania Transatlantica Espanola, 144 N.Y. 663, 39 N.E. 360; Cf. 45 Harv. L. Rev. 349, 351; Keener, Quasi-Contracts, p. 408."

In *Read vs. United States*, 201 Fed. (2d) 758, February 4, 1953, the following quotation is pertinent:

" 'The fundamental theory is that where a person has a non-delegable duty with respect to the condition of his premises or vessel but has made a contract with another to perform that duty, and the other performs it negligently so as to make the owner liable to a person later injured, then, as a matter of implied contract, the owner is entitled to restitution from the other for reasonable damages paid the injured person.' Barber S.S. Lines, Inc. vs. Quinn Bros., Inc., D.C.D. Mass. 1952, 104 Fed. Supp. 78, 80. See Restatement, Restitution, Sec. 96.

"Pioneer contracted to furnish adequate lights and did not, even after it was found there was only one light in the entire hold and that other lights belonging to the ship would not work, and for that breach alone of its contract, the United States is entitled to its judgment against Pioneer, independent of any express provision for indemnity in the contract. 'It is immaterial that there was no express provision for indemnity in the contract between these

parties.' Burris vs. American Chicle Co., 2 Cir., 1941, 120 Fed. (2d) 218, 222.

"The mere circumstance that the contract also contained an express provision for indemnity was not in any sense the dispositive factor in establishing the right of the United States against Pioneer arising out of the breach of its contractual duty—above described."

In *Palazzolo vs. Pan Atlantic S.S. Corp.*, 111 Fed. Supp. 505, April 7, 1953, a pertinent reference is as follows:

"Pan-Atlantic argues that liability has been visited upon it solely because of an improper stowage of cargo which made the ship unseaworthy and that since Ryan alone created the unseaworthiness which is 'essentially a species of liability without fault,' Seas Shipping Company vs. Sieracki, 328 U.S. 85, 94, 66 S. Ct. 872, 877, 90 L.Ed. 1099, this case comes within the rule of those cases which imply a contract of indemnity based upon the failure of a party to properly perform work which it contracted to do. See: Burris vs. American Chicle Co., 2 Cir., 120 Fed. (2d) 218; Rich vs. U.S., 2 Cir., 177 Fed. (2d) 688; Standard Oil Co. vs. Robbins Dry Dock & Repair Co., 2 Cir., 32 Fed. (2d) 182; Seaboard Stevedoring Corporation vs. Sagadahoc S.S. Co., 9 Cir., 32 Fed. (2d) 886; U.S. vs. Rothschild International Stevedoring Co., 9 Cir., 183 Fed. (2d) 181. In such

cases the employer's or indemnitor's negligence is described as being the 'sole,' 'active,' 'primary' or 'affirmative' cause of the employee's injury."

D. BEDAL'S SOLE AND ACTIVE NEGLIGENCE ADJUDICATED:

Counsel for Appellant appreciate that both this Court and the Supreme Court of the United States have held against their contentions; this accounts for their frantic attempt to distinguish and explain the decisions of this Court and the Supreme Court. Despite their semantics and sophistry, they are still confronted in the end with the fact that all acts and conduct upon which any liability could be based resulting in loss to the innocent party, Appellee, Hallack and Howard Lumber Company, were those of Appellant Bedal, and arose solely by his wrong doing.

First, counsel devote about one-third of their brief to the proposition that Bedal's negligence was not adjudicated in the Powell case because Bedal was not a party and had no opportunity to defend. As heretofore pointed out, there is no merit to such contention, because not only did Bedal know about Powell's claim, had notice of the suit, a copy of the complaint and was advised that he would be held responsible for any judgment—but he refused to defend. Having affirmatively admitted a refusal to defend the Powell suit, any additional notices or tender would have been vain and futile. Accordingly,

as pointed out by counsel in their brief (p. 47), he is no longer a stranger to that suit and he had the same 'means and advantages of controverting the claim as if he were the real and nominal party upon the recording.'

Then counsel state that Bedal's negligence was not adjudicated in the Powell suit, but that Bedal should have another chance to submit the matter to another jury—and upon the same evidence. It will be noted that Appellant offered nothing in addition to the testimony in the Powell suit. He only complains that he was not permitted to ask U. R. Armstrong certain questions (R. 34), which palpably were improper cross-examination, and the Court had a right to sustain objections to the same. Not only was no testimony introduced by Appellant, but he made no offer of proof. The transcript in the Powell case was offered by Appellees and admitted to show the facts and the scope of that which was adjudicated in the Powell suit. In addition, the testimony of certain witnesses that testified in the Powell suit was read into the record. The same trial Court had the same evidence before it in the Powell case. The question of Bedal's negligence had been before the Court once before. A jury had found such negligence. The Court specifically in the Powell case denied a motion for judgment notwithstanding the verdict upon the ground that Bedal was negligent—the sole and only active negligence—and that the railroads were liable even though the negligence was solely that of Bedal inasmuch as their duty was nondelegable.

The facts necessarily found in the Powell case necessarily determined the sole and active negligence of Bedal. The finding of Bedal's negligence was necessary to sustain the verdict. The only act complained of or involved was the act of Bedal. No separate or other act or violation of duty was claimed as to the railroads. In this case there was no cart which had been left for an undetermined time, nor a allegation of specific negligence that it was the duty of the railroads to warn the employee as in the case of Booth-Kelly Lumber Co. vs. Southern Pacific Co., supra. As a matter of fact, counsel argue in their brief that there was nothing in Bedal's operation to cause the railroads to warn any employee, because (there was no negligence and that) the same operation had been carried on in the same manner over a long period of time. Counsel affirmatively argue that there was nothing that the railroads could or should have done. Accordingly, as above mentioned, counsel are again driven back to the fact that the only possible basis of the Powell verdict was the conduct of Bedal.

Despite the fact that, as pointed out by the trial Court, Appellee, Hallack and Howard Lumber Company, is an innocent party, it is now required to pay the loss sustained as a result of such sole and exclusive conduct of Bedal. Counsel argue, however, that despite such situation, Bedal was not negligent, even though but for such negligence the verdict could not have been sustained against the railroads. Assuming that Bedal could re-litigate the verdict, counsel argue that there was no evidence of Bedal's negligence, "in

cutting the logs in the forest or negligent in the loading of them on the truck, or negligent in driving the truck to the place where they were dumped (Brief p. 56)." This is contrary to the record. In the first place, one of Bedal's agents and servants testified:

> "Q. Do you know whether or not in cutting the log in the forest, or cutting and trimming them after they had fallen, are they sometimes splintered?
>
> "A. I believe they are sometimes splintered. I think they (66) could have been in falling or in skidding."

In other words, Bedal knew that in his cutting operations the logs sometimes were splintered in falling or in skidding. There is no evidence that the railroads had any knowledge or should have known this fact.

Another one of Bedal's agents and servants testified as follows (R. 206):

> "Q. From your experience up there can you tell me, first, when these logs are cut and before they are hauled to the unloading dump, are some of them splintered sometimes?
>
> "A. Yes, I would say so.
>
> "Q. And did this slab indicate that it was splintered off a log that might have been cut in the forest?
>
> "A. I never questioned that part of it. I suppose it was, it could have been an unseen splinter there with the load.

"Q. Something that developed with the cutting of the logs?

"A. *Yes, I would say that it had occurred that way probably.* I know it could happen and it would happen lots of times, that there would be splintered logs.

"Q. Ordinarily the only thing that comes off those logs would be the bark?

"A. Bark and very small limbs.

"Q. And this was not a limb?

"A. No, it wasn't.

"Q. It was bark that had some timber on it?

"A. Yes, sir."

Bedal, through his agents and servants, knew or should have known that a splintered log should not be dumped over a steep bank where it would land with terrific force a considerable distance below with the foreseeable result that a piece of such splintered log might fly off and injure a third person. Inasmuch as counsel argue that no such splintered log had been dumped over the steep embankment at this particular location before, and no piece of such splintered log had ever been thrown off at this particular landing before, the railroads manifestly could not be charged with any duty resulting from any knowledge that such a negligent act would be performed by Bedal at the time and place involved.

It was for this reason that the trial Court held in the Powell case that the handling of the logs by Bedal was negligence, and which particular phase of the operation was negligent was a question for

the jury. It was the only question, because no separate act of negligence was alleged as to the railroads, and but for the negligence of Bedal, the verdict could not have been sustained.

It is, of course, axiomatic that under the Federal Employers' Liability Act, railroads are not insurers. The universal rule is specifically stated in 56 C.J.S. 945:

"A railroad company is not an insurer of the safety of its employees. * * * Fault or negligence may not be inferred from the mere existence of danger."

"Recovery cannot be had in the absence of negligence. Toledo St. L. & W. R. Co. vs. Allen, 72 L.Ed. pp. 513; Seaboard Air Line R. Co. vs. Horton, 233 U.S. 492, 502, 58 L.Ed. 1062, 1069, L.R.A. 1915C, 1, 34 Sup. Ct. Rep. 635, Ann Cas. 1915B, 475, 8 N.C.C., A. 834."

Manifestly, cases involving separate acts of negligence by a railroad are not applicable. We have heretofore attempted to point out that where a railroad was negligent independent of the act of the independent contractor the adjudication is not necessarily determative of their respective liabilities. In the case at bar there was neither alleged nor shown, any act of negligence other than that of Bedal which was non-delegable as to Appellees.

We say Appellees, because even though Bedal was an independent contractor, the rule of non-delegable duty would be equally applicable to it. The rule is well stated by the Supreme Court of the United

States in Chicago vs. Robbins, 67 U.S. 418, 17 L. ed. 298. The trial Court was well aware of this rule and hence placed his ruling not only upon express indemnity, but implied indemnity as well. As heretofore pointed out, Appellee, Hallack and Howard Lumber Company was well aware of the possibility of such non-delegable duty, and hence protected itself by the express indemnity, which we have heretofore fully discussed. Although Appellant submitted the case at bar upon the same evidence as in the Powell case and failed to offer any proof whatsoever in explanation of any of Bedal's acts or conduct, he still insists that he should be free to re-litigate negligence in the case at bar. A jury having once found that his conduct was negligent, Appellant's only desire is to submit the same evidence to another jury. In view of his refusal to defend he admits that he is no longer a stranger to the Powell suit, but he is the same as if he were a real party to the action (R. 47). The situation is not dissimilar to that in the case of *Waylander-Peterson Co. vs. Great Northern Ry. Co.*, 201 Fed. (2d) 409, where the railroad's employee was working under a bridge where an independent contractor was working. The employee was found with a timber lying across his legs. The timbers were being installed by the contractor immediately above the tracks where the timber was found. As in the case here, the contractor was in exclusive control of the part of the bridge where the timber must have fallen. As in the case at bar, no explanation was offered as to how the timber struck the employee: The Court found:

"The jury could have found from the testimony that a timber similar to the one that struck plaintiff was on the bridge above the track where Lawrence was injured and that such timber would not have fallen unless it had been negligently left at a point where it would fall on a day when there was but little wind."

The Court then said:

"'* * * the accident itself affords reasonable evidence in the absence of explanation by the person in control that it arose from want of care."

As in the case at bar, the railroads' duty was nondelegable. However, the Court held that the railway company was not in control; the railway company did not create the situation. The only negligence that could be attributed to make the railway company liable arose out of the wrong-doing of the contractor. The Court said:

" '* * * The railway company had no control over the construction of this bridge or of the workmen who were employed thereon. The railway company was required to operate its trains under the bridge and to direct its trainmen to perform their duties in and about the bridge. The repeated instances of timbers and debris falling from the bridge, which rendered the railway company liable under the Federal Employers' Liability Act, was a condition which

> the railway company did not create. Its liability arose because of the non-delegable duty which rested upon it to exercise reasonable care to furnish Lawrence a safe place to work. Any negligence attributed to it so as to render it liable to Lawrence arose by the wrongdoing of those in charge of the construction of this bridge. The primary duty rested upon Waylander-Peterson Company to perform its work on the bridge as not to endanger the workmen who were required to work in proximity thereto. Its neglect was the primary, active cause of Lawrence's injuries. The railroad company's negligence, as between the parties, was secondary and passive'."

The same principle was applied in *Burris vs. American Chicle Co.*, supra. There was no evidence of any independent act of negligence on the part of the owner of the building. The only conduct upon which a verdict could possibly have been based against the building owner was the act or conduct of the window-cleaning contractor. The adjudication was sufficient to sustain liability over against the contractor.

Counsel argue that under the case of *Chicago vs. Robbins*, supra, Appellant had a right to *show* that the accident happened without his fault. In the first place, Appellant made no such showing and offered no proof. In the second place, the Robbins case is an illustration where separate acts of negligence were alleged, and the evidence was not necessarily

identical. In other words, it was alleged that there was actual notice and therefore a different duty than one implied by law. This was clearly distinguished by the Supreme Court of the United States in the case of *Washington Gaslight Co. vs. District of Columbia*, 161 U.S. 316, 16 S. Ct. 564, 40 L. ed. 712. The latter case is identical with the case at bar in that the findings in the first action were an essential pre-requisite to the judgment, and therefore could not be re-litigated in the second action. The Court said:

> "The verdict, therefore, against the District necessarily determined that the defect in the gas box had existed for such a length of time as to impute negligence to those whose duty it was to keep it in repair. The finding of this fact in the first action was an essential pre-requisite to a judgment against the District. The length of time required to imply knowledge and negligence on the part of the District is also sufficient in law to imply such knowledge and negligence on the part of the Gas Company. It follows, therefore, that the judgment against the District conclusively established a fact from which, as the duty to repair rested on the Gas Company, its negligence results."

In other words, "but for" the finding of certain facts, the judgment could not be sustained; so likewise, as hereinbefore pointed out, but for the acts and conduct of Bedal, the Powell judgment could not be sustained. These facts, therefore, are adjudicated and cannot be re-litigated.

Inasmuch as Bedal did not offer any additional proof, no explanation of why he was not negligent in controlling the premises and handling logs which resulted in injury to Powell, let us assume that such same record as was submitted to the jury in the Powell case had again been submitted by the Court to a jury in the case at bar, and the second jury upon the same facts would have found no negligence. Could the trial Court have done anything upon a motion for a judgment notwithstanding the verdict except to set it aside? This the Court clearly indicated in its memorandum opinion. In fact, the Court would have been compelled to grant such motion because the judgment in the Powell case as well as the evidence submitted conclusively established the sole negligence of Bedal.

It will be remembered that in the case of *Washington Gaslight Co. vs. District of Columbia*, supra, the trial Court admitted the transcript in the original case not only to determine the scope of the thing adjudged, but also as probative of the facts therein disclosed. The Supreme Court of the United States said that the latter was erroneous and the transcript could not be used to prove the facts as such. However, the Court very pointedly said:

> "The fact that it was admissible for the purpose of determining the scope of the thing adjudged in the suit in which it was given did not justify its being used for a distinct and illegal purpose. Error, however, in this particular was in no sense prejudicial if the judgment in the

first action conclusively established the negligence of the Gas Company."

For the trial Court to have done otherwise than grant such motion, would have permitted Bedal to escape the consequences of his own wrong-doing—his conduct which was the only conduct that resulted in the loss sustained. To have done otherwise, would have resulted in the innocent party, Appellee, Hallack and Howard Lumber Company, paying for the wrong committed by Bedal and would have done violence to the principle repeatedly annunciated not only by this Court but by the Supreme Court of the United States, that everyone is responsible for the consequences of his own wrong, and if another person has been held legally liable and compelled to pay the damages which the wrong-doer should have paid, the latter becomes liable to the former.

E. THE SCINTILLA OF EVIDENCE RULE DOES NOT OBTAIN IN THE FEDERAL COURTS.

On page 72 of his brief, Appellant states:

"The District Judge ignored the multitude of Idaho cases which construe a motion for a directed verdict against the party making the motion. Appellants need not spend time here discussing the well known principles of law surrounding the proper use of the directed verdict."

and then cites nine Idaho cases.

We believe it only necessary to point out that the Idaho cases cited by Appellant have no application here, as:

> "The state rules of practice have no application to the practice in federal courts with respect to the submission of jury issues, the direction of verdicts, or the sufficiency of the evidence to sustain a verdict upon a motion for directed verdict * * * ."
>
> Barron & Holtzhoff, Federal Practice & Procedure, Vol. 2, p. 755.

Under the Idaho practice a mere scintilla of evidence is sufficient to take a case to the jury. This is not true in the Federal Courts.

> Barron & Holtzhoff, Federal Practice & Procedure, Vol. 2, p. 758.

The above stated rule has been stated so many times that we hesitate to take any space to comment upon it and we merely cite the case of *Gunning vs. Cooley*, 281 U.S. 90; 74 L.Ed. 720. Likewise, it is a well-established rule that in any case where the record is in such a condition that if the trial Court would be compelled to set an adverse verdict aside it would be the duty of the trial Court to grant the motion for a directed verdict.

> Elliott vs. Chicago M. & ST. P. RR Co., 150 U.S. 245, 37 L.Ed. 1068.

F. SINCE BEDAL HAS ADMITTED THAT HE 'FAILED AND REFUSED' TO DEFEND THE POWELL CASE NO TENDER WAS NECESSARY.

Appellant, Bedal, admits that he not only knew about the suit of Powell against the railroads, but that he also received a copy of the complaint (R. 76).

The Supreme Court of the United States in the case of *Chicago vs. Robbins*, 67 U.S. 418, 17 Law Edition, 298, etc., said:

> "He is concluded by the judgment recovered, if he knew that the suit was pending and could have defended it."

However, Appellant contends that in addition to such knowledge and receipt of the complaint, the defense should have been tendered to him. Even if this were necessary under Appellant's admissions, such tender would have been futile. Appellant admitted that he refused to defend such suit (R. 76).

The rule is briefly stated by *Williston On Contracts*, Vol. 6, page 5154:

> "So where the obligee has manifested to the obligor that tender, if made, will not be accepted the obligor is excused from making the tender."

In *Elliott On Contracts*, Vol. 3, page 128, the rule is laid down as follows:

> "It is a maxim that the law does not require a man to do a vain and fruitless thing, so it has been held that a strict and formal tender is not

necessary where it appears that if made it would have been vain and fruitless."

In *Restatement of the Law of Contracts*, Vol. 1, page 451, the law is stated:

> "No man is compelled to do a useless act, and if performance of a condition will not be followed by performance of the promise which is conditional, it is useless for the intended purpose and it is therefore unnecessary to perform the condition."

Many cases are cited in *17 C.J.S., page 986*, under the rule, "Non-tender is excused where it is apparent that a tender would be a vain and idle ceremony."

Typical cases in California and Washington are the following:

In *N. Pac. Sea Produce Co. vs. Nieder and Marcus*, 241 Pac. (Wash.) 682. Tender was excused, the Court saying:

> "They had repudiated the contract upon the theory that they were entitled to rescind, and their whole attitude in the case from beginning to end renders it plain that any tender would have been refused by them."

So likewise in the case of *Cowan vs. Tremble*, 296 Pac., (Cal.) 91, where the Court held that tender was unnecessary where the facts showed tender, would have been unavailing.

In other words, the rule is as old as it is universal that where the facts disclose that the tender would have been futile, it is no defense to contend that no tender was made. In the case at bar the futility is more apparent, because Appellant admits by his pleadings that he actually refused to defend.

We submit that the judgment secured by the Appellee Lumber Company against the Appellant should be affirmed.

Respectfully submitted,

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Lumber Company.

APPENDIX "A"

THE CASES CITED BY APPELLANT ARE NOT IN POINT.

In this Appendix we are distinguishing the cases cited by Appellant which have not been distinguished in the main brief.

We discuss the authorities in the order in which they appear in Appellant's opening brief.

On page 37 of his Brief Appellant cites the case of *In re Sharp*, 15 Idaho 120, 96 Pac. 563, which holds that a judgment can only bind the party thereto or the privies of parties to the action. This, of course, is sound law but has nothing to do with an indemnity agreement to hold a party harmless, and nothing to do with the liability under an implied indemnity agreement.

On page 37 of his Brief Appellant cites 30 *Am. Jur.*, Sec. 220. No page number is given and we assume Appellant intended to refer to Section 220 under the subject of 'Judgments'; if so, we have no quarrel with the general rules expressed therein.

On page 38 of his Brief Appellant refers to an article by Warren A. Seavey in Vol. 51, Harvard Law Review, page 100 (1943).

This is the wrong citation—*Vol. 51 Harvard Law Review* was published in 1937-1938.

After much search we found a note signed "W.A.S." in *Vol. 57, Harvard Law Review*, page 98, entitled

> "Res judicata with reference to persons neither parties nor privies—"

Two California cases were discussed, to-wit:

> Bernhard vs. Bank of America, 19 Cal. (2d) 807, 122 Pac. (2d) 892 (1942).

where it was held that the question of whether certain money had been a gift or had been embezzeled was *res judicata*, and that the defendant bank could claim the benefit of the former judgment although it was not a party nor a privy to any party to the prior proceeding.

Also:

> Perkins vs. Benguet Consolidated Mining Co., 55 Cal. App. (2d) 720, 132 Pac. (2d) 70.

and speaking of the above cases, the author states:

> "These two California cases are examples of the growing tendency of the Courts to hold that a defeated party should be precluded from setting up the same issue in a subsequent action

against a different opponent."

On page 39 of his Brief Appellant refers to Vol. 35 Yale Law Journal, p. 607 (1926). This is another general discussion with which we are not concerned here.

However, the author does discuss mutuality and privity and states that where a master has been found not negligent while acting through a servant, that a judgment against the plaintiff is conclusive,

as to the servant's negligence in a subsequent action brought by the same plaintiff against the servant.

On page 39 of his Brief Appellant cites the case of *American Surety Company of New York vs. Singer Sewing Machine Co.*, 18 Fed. Supp 750, 753. We call attention to the holding of the above case where it was held:

> "While the Singer Company was not a party to that suit, the facts there adjudicated against the surety company are conclusive against it when it seeks to compel the Singer Company to respond to the loss sustained in that suit."

On page 40 of his Brief Appellant quotes from the *Restatement of the Law of Judgments*, Sec. 107.

Appellant claims that the quoted statement does not apply in this case because Hallack and Howard was not a party to the prior suit (Powell vs. Railroads). We urge that this is not a distinction because Bedal was duly notified and given every opportunity to defend the Powell action and he has admitted that he "failed and refused" to do so.

On pages 41 and 42 of his Brief Appellant again quoted from the Restatement of the Law of Judgments, p. 513.

These statements as quoted by Appellant do not in any way support his position in this case because here it has been conclusively shown that Appellant had every opportunity to defend and "failed and refused" to do so.

In speaking of Tender, *Restatement of the Law of Judgments*, at p. 516, states:

"Such tender is not essential if the indemnitor indicates that he would not participate * * * On the other hand, if he is aware that the indemnitee intends to hold him if judgment is against the indemnitee and that indemnitee is unaware of the necessity of giving notice and a tender of control, the indemnitor will be estopped to set up the fact that he has not received notice of the action or a request to participate in the defense."

On page 44 of his Brief Appellant states that a principal is not liable for the negligent acts of an independent contractor, and in support of this doctrine, cites 27 *Am. Jur.*, p. 504, Sec. 27.

If this is true, why was the indemnity agreement placed in the Bedal-Hallack and Howard Contract (Ex. 8, R. 33, 35)? Why did they provide that Bedal was to take out public liability and property damage insurance and "specifically name and protect said first party in case of possible accident involving persons or property not connected with or owned by the parties to this contract"?

On page 46 of his Brief Appellant cites the case of *Washington Gaslight Company vs. District of Columbia*, 161 U.S. 316, 40 L.Ed. 712. This case needs no further comment here.

On page 47 of his Brief Appellant cites *Restatement of the Law of Restitution*, Sec. 94, p. 413.

We have read the above authority and it does not support Appellant's position in the slightest degree.

Section 238 of 30 Am. Juris., p. 970, is cited by Appellant on page 48 of his Brief, but see the following:

> "A mere notice with no offer to surrender the defense of an action has been held insufficient. However, there are also cases in which it is held that a judgment is conclusive against a person liable over where he is notified of the defense of the original action, although he is not requested to take charge of the litigation or notified that if he fails to do so he will be held responsible."
>
> 30 Am. Juris., Sec. 241, p. 972 (judgments).

Note cites:

> Drennan vs. Bunn, 124 Ill. 175, 16 N.E. 100, 7 Am. St. Rep. 354.

United States Fidelity & Guaranty Co. vs. Dawson Produce Co., 68 Pac. (2d) 105 (Okla.) cited by Appellant on page 48 of his Brief. Oklahoma had a workmen's compensation act which covered only some employees and only some injuries.

The Dawson Produce Company took out a policy with the United States Fidelity & Guaranty Company insuring it against injuries to employees.

When the injured employee sued Dawson it pleaded he was covered by workmen's compensation which was a bar. It also gave notice and an opportunity to defend. The employee recovered and then

Dawson sued the Insurance Company, and the Court held:

> "Singhrs (employee) did not in his petition seek to have the business relation thus described classified as one of employment and such a classification thereof was not essential to his cause of action.
>
> "The finding of the court in the former action that he was an employee was therefore not responsive to any issue tendered by the plaintiff's petition in that action.
>
> "* * * The general judgment in favor of Singhrs in the prior action amounted to a denial of this contention and a negative finding thereon." i.e., that he was an employee.

Inashima vs. Wardall, 224 Pac. 379, 128 Wash. 617, cited by Appellant on page 48 of his Brief, was a case where the mortgagee tried to follow mortgaged car which had been sold. The mortgage showed the name 'George Kioke' in several places; signature illegible; real name was 'George Koike.' This case merely holds the County Recorder had pleaded a good defense and judgment in original foreclosure action not conclusive, and the Court held:

> "It was enough in that suit (original) for the purchaser to show that at the time of his purchase he had no actual notice of the existence of the mortgage, and that the records did not afford constructive notice to him. Whose fault it was that the records were thus defective

> in no way concerned him. He could recover whether the fault lay with the mortgagee or with the auditor, and any dispute between these persons had no place in the suit he was litigating."

NOTE: In the above case, the question concerning notice involved service on the agent of the surety instead of statutory agent.

The case of *Southwestern Railway Co. vs. Acme Fast Freight,* (Georgia) 19 S.E. (2d) 286, cited by Appellant on page 48 of his Brief, was an action under a statute of Georgia relative to vouching in. It involved the loss of a shipment of goods; in the final action against Southwestern Railway it was stipulated by counsel that:

> "the pilferage of the carton occurred in New York City and before the shipment was transferred by the Pennsylvania Railroad to the Southern Railway Company (which took place at Baltimore, Maryland)."

The Court decided one single question under the Georgia Code, and then said:

> "Despite the rule we have indicated, it may, however, well be conceived that the vouchee under the particular facts of a case may also be precluded by the original suit as to the additional question of his own liability over to his voucher. This would seem true in a case where, upon being vouched into court, his response as

made by his own pleading or his actual procedure in his conduct of the case necessarily establishes his own liability over to the original defendant for any recovery which might be had against that defendant."

Appellant, at page 48 of his Brief, cites the case of *City of Lewiston vs. Isaman,* 19 Idaho 653, 115 Pac. 494.

We consider this case directly in point in support of our position here. In that case the McLean's had recovered a judgment against the City of Lewiston because of personal injuries received by reason of defective doors placed in the sidewalk in front of Isaman's business building. The evidence showed that at the time of the accident Isaman had leased the building to a third party and it was the duty of the tenant to keep the building and premises in repair. Isaman demanded of the City Attorney that he be permitted to appear in the main case and defend it, and the City of Lewiston refused to permit his intervention in the lawsuit charging that Isaman was in no way interested in the lawsuit and was probably not liable.

However, as is generally known, the City of Lewiston was operating under a City Charter which authorized it to provide sidewalks and gutters and to regulate cellar-ways and cellar lights and sidewalks, and then provided:

"The city of Lewiston shall be liable to anyone for any loss or injury to person or property

> growing out of any casualty, or accident happening to any such person or property on account of the condition of any street or public ground therein; but this section does not exonerate any officer of such city, or any other person from such liability when such casualty, or accident is caused by the wilful neglect of a duty enjoined upon such officer or person by law, or by gross negligence, or wilful misconduct of such officer, or person in any other respect."

The above quoted Section was the basis for the Supreme Court's decision, and the Supreme Court of Idaho proceeded to distinguish the case of *Washington Gaslight Co. vs. District of Columbia*, 161 U.S. 316, 16 Sup. Ct. 564, 40 L. Ed. 712, and stated:

> "There are no such facts in the case at bar. The charter of the city of Lewiston provides that if casualty or accident is caused by the wilful neglect of a duty enjoined by law or by gross negligence or wilful misconduct, then the person is liable; otherwise, not."

and finally the Supreme Court of Idaho said:

> "There are at least two reasons why the judgment in this case must be reversed; First, defendant is not liable on the facts of this case under the provisions of said section 93 of the charter of the city of Lewiston which makes the city liable for any loss or injury to person or property growing out of any casualty or ac-

cident happening to any person or property on account of the condition of any street or public ground therein, and only makes the property owner liable when such casualty or accident is caused by wilful neglect of a duty enjoined by law or by gross negligence or wilful misconduct on the part of such person, and it is not made to appear from the evidence that the defendant is guilty of any acts which would bring him within the provisions of said section 93; and second, even if there were any liability under the charter, it would not fall on appellant as he had leased the entire premises and tenants had possession thereof."

City of Lewiston vs. Isaman, 19 Idaho 653, at pp. 673-674, 115 Pac. 494.

So under the *City of Lewiston* case the Supreme Court of Idaho did not pass upon a state of facts in any way similar to the facts in the case at bar, and that case is not authority to the effect that generally a recovery over can not be had.

The true Idaho rule is stated in the case of *Baille vs. City of Wallace* (1913) 24 Idaho 706, 135 Pac. 850, where it appeared that an Express Company had placed a sign over the street, and a judgment was had against the City, and our Supreme Court said:

"While the city is liable in the first instance when it is negligent in such matters, the person or corporation that places such obstructions in

> or over the sidewalk or street is liable to the city for whatever damages it has to pay for such unlawful acts."

Appellant cites the case of *Seattle vs. Northern Pacific Railroad Company* (Wash.) 92 Pac. 411, on page 48 of his Brief.

The facts set forth in that case are entirely different from the case at bar; in that case a small boy, while on the property of the Northern Pacific Railway Company, suffered a severe injury and brought an action against the Northern Pacific Railway Company to recover therefor, and in that case a judgment was entered in favor of the Northern Pacific Railway Company. Later, the injured boy instituted an action against the City of Seattle and recovered a judgment against the City of Seattle.

Then the City of Seattle sued the Northern Pacific Railway Company, and it appears from the facts in that case, that after the action had been commenced by the boy against the City of Seattle the Railway Company notified the City of Seattle and requested the City to plead the former judgment in favor of the Railway Company, and the City refused to do so, and on that ground the Court held the City could not recover from the Railway Company.

Appellant also cites the case of *Burchett vs. Blackburne,* (Ky.) 248 S.W. 853, at p. 49 of his Brief.

In that case it appeared that a grantor had conveyed property with a warranty of quiet and peaceable possession. A third party had instituted an

action claiming that he owned the property conveyed. The grantee failed to give the warrantor notice of the pendency of the action, and since the warrantee had not been dispossessed, the Court held he could not recover against the warrantor, but the Court did hold that if notice had been given that the judgment in the former case would be res judicata against the warrantor.

Appellant, at page 49 of his Brief, cites the case of *Crawford vs. Pope and Talbot Inc.*, et al., 206 Fed. (2d) 784 (3rd Cir., 1953). In this case Crawford and Lucibello sued Pope and Talbot, Inc. and General Engineering Works for personal injuries; they suffered the injuries while working on a ship called the 'Jones' which was under charter to Pope and Talbot, Inc. The defendants pleaded no negligence and contributory negligence. The General Engineering Works, a welding company was employed by Pope and Talbot to repair the vessel tanks, and during the course of the trial the actions were dismissed as to the General Engineering Works and no appeal was taken from the order of dismissal.

The Defendants filed a petition to bring into the action Cecelia O. Jeffries, individually and trading as the National Boiler Cleaning Company; the motion bringing in Jeffries was granted but this petition was later dismissed on the ground that the libellants or plaintiffs were her employees, and subject to the provisions of the Longshoremen's and Harbor Workers' Compensation Act, and therefore could not sue her.

It was found that there was no contributory negligence and that the original defendants, Pope and Talbot, were negligent.

The Court held first that the Longshoremen's Act prevented the plaintiffs from suing their employer, and that therefore Pope and Talbot were not entitled to contribution. The Court specifically held, however, that the Act:

> "does not insulate the employer from all liability to a third party from whom an employee has recovered damages. See United States vs. Arrow Stevedoring Co., 9 Cir., 1949, 175 Fed. (2d) 329, 332. Liability for indemnity as distinguished from contribution, may arise from the contractual relations of the employer with the third party. Claims for full indemnity arising out of such contractual relations have *not* been considered barred by the section. See Rich vs. United States, 2 Cir., 1949, 177 Fed. (2d) 688. The right to indemnity can, of course, arise by virtue of an express contract or such a right may be raised from the circumstances surrounding the contractual relationship between the employer and the third party. In either case the indemnitee has a claim which is independent of and does not derive from the injury to the employee, except in a remote sense not within the provisions of Section 5. Compare Hitaffer vs. Argonne, 1950, 87 U. S. App. D. C. 57, 183 Fed. (2d) 811, 819-820, 23 A.L.R. (2d) 1366. We conclude that Pope and Talbot should

have been permitted to implead National on its claim for indemnity insofar as Section 5 is concerned."

and the Court cites the following:

Westchester Lighting Co. vs. Westchester County Small Estates Corp., 1938, 278 N.Y. 175, 15 N.E. (2d) 567;
Burris vs. American Chicle Co., 2 Cir., 1941 120 Fed. (2d) 218.

and then the Court said:

"It follows that Pope and Talbot is not entitled to contribution from National but may be entitled to indemnity."

The Court then, after reviewing various authorities regarding the judgment in the original action being final, said:

"Where, on the other hand, the indemnitee and the indemnitor are co-defendants actively participating in the defense of the original action, or where the indemnitor, with notice of the action and of the indemnitee's request that he defend it, does not participate in the defense but leaves it to the reasonable efforts of the indemnitee, then in subsequent litigation between them both indemnitor and indemnitee are bound by the findings necessary to the judgment in the action."

and the Court then held that since National had been dismissed by order of the Court that the prior judgment was not conclusive.

> Crawford vs. Pope & Talbot, Inc., et al, 206 Fed. (2d) 784.

Appellant, at page 53 of his Brief, cites the case of *Robb vs. Security Trust Company*, 121 Fed. 460 (3rd Cir.).

This case is not at all similar to the case here. In the above case the indemnitee failed and refused to cooperate in the taking of an appeal in which, if it had been taken, there would have been a reversal of the first judgment.

All that the *Robb* case holds is that when an indemnitor takes charge of litigation on behalf of the indemnitee he should be allowed to take an appeal.

Appellant, in his Brief at page 54, cites the case of *Cofax Corporation vs. Minnesota Mining & Manufacturing Co.*, 79 Fed. Supp 842 (S.D.N.Y.) 1947. This case involved patent infringements. The original actions had been against independent selling agents; all that this case holds is that one of the companies

> "was not the instrumentality, agency or subsidiary of The Cofax Corporation in the State of Illinois."

Here, the defendant had prevailed in infringement suits in Illinois against the distributors of Cofax tape; Cofax had entered into a contract to defend

Freydberg Brothers against infringement suits. Plaintiff in the present action had refused to defend Freydberg. However, Minneosta Mining & Manufacturing Company set these facts up as res judicata.

It will be noted that Cofax was suing Minnesota for infringement; Freydberg, the original indemnitee, was not in any way involved in the Cofax case against Minneosta Mining & Manufacturing Company; while, in the case at bar, the indemnitee, The Lumber Company, is suing the indemnitor, W. O. Bedal.

Appellant, in his Brief, at page 54, quotes, in part, from 42 *Corpus Juris Secundum*, Sec. 32, page 617-618, Comment (c) (Indemnity). Appellant significantly does not quote the entire paragraph and leaves out the very important statement:

> *"but he is precluded from making a defense which he could have made in the first action."*

Here, Bedal had every opportunity to participate in the first action but he 'failed and refused' to do so.

As a foot note on page 54 of his Brief, Appellant quotes from Section 96 (2), *Restatement of the Law, Judgments*, but on page 482 of that work, it is stated:

> "This is to be contrasted with the rule stated in Section 107, to the effect that in the subsequent action by the indemnitee against the indemnitor, a valid judgment rendered under such circumstances is conclusive."

In ruling on the motion made in the Powell case for judgment notwithstanding the verdict, the Court said:

> "Defendant's motion for Judgment Notwithstanding the Verdict having heretofore been presented to the Court on oral argument of counsel for the respective parties and the matter having been taken under advisement by the Court and the Court having carefully reviewed the evidence submitted at the trial in order to determine whether the evidence of negligence was sufficient to justify the Court in submitting the case to the jury, finds: according to the testimony the plaintiff was struck by a slab from a log being unloaded from a truck on a road some twenty feet above the location of the bunkers where the logs were loaded on the train. A 'Cat' and Boom was used, a line placed underneath the logs and they were pushed off the truck and would fall down a steep incline unrestrained a distance of about twenty feet. Where they were pushed from the truck the incline was so steep that they fell through the air a distance of about twelve feet before they hit the ground and then rolled on the balance of the distance to the Bunker. The Slab that caused the injury to the plaintiff broke off one of those logs and was thrown through the air and, no doubt, was caused to break from the log because of the force of the drop.
>
> "Whether the operation in driving the trucks to the top of this steep embankment, pushing the

logs from the truck and allowing them to descend this steep incline to the track was negligence was a question for the jury.

"If there is a reasonable basis in the record for concluding that there was negligence of the employer which caused the injury it would be an invasion of the jury's function by this Court to draw a contrary inference or to conclude that a different conclusion would be more reasonable. (Ellis vs. Union Pacific Railroad Company, 329 U. S. 649.)

"The motion will be denied, and it is so Ordered." (R. 141-142)

A request for admission was served on Bedal (R. 155), and Bedal admitted:

"That the injuries to the said A. M. Powell at Banks, Idaho, on the 15th day of September, 1949, were caused by a piece of timber which broke off one of the logs being unloaded on or onto the leased premises." (R. 155-156)

Bedal also admitted:

"Admits that W. O. Bedal, his agents, servants and employees were unloading logs onto or toward the premises covered by Exhibit 'A' attached to the complaint, and near the place where A. M. Powell was injured; admits that the unloading of said logs was for the use and benefit of Hallack and Howard Lumber Company—all pursuant to the contract which is attached to Third-Party complaint;" (R. 159)

Appellant, in his Brief at page 65, cites the case of *Taylor vs. J. A. Jones Construction Co.*, (N.C.) (1928) 141 S.E. 492. In this case the building contractor and subcontractor were both negligent and contributed to injury and were both joint tort-feasors. The Court discusses the general equitable rule, saying:

> "The general rule is that there can be no indemnity or contribution between joint tort-feasors.
>
> "It is also familiar learning that there are certain well-recognized exceptions to general rules and that in proper cases indemnity or contribution is allowed, but such recoveries rest solely and entirely upon established principles of equity."

The Court then quotes from an Illinois case as follows:

> " 'Where one of them is only passively negligent, but is exposed to liability through the positive acts and actual negligence of the other, the parties are not in equal fault as to each other, though both equally liable to the injured person. * * * The further general principle is announced, however, in many cases, that where one does the act which produces the injury, and the other does not join in the act, but is thereby exposed to liability and suffers damage, the latter may recover against the principle delinquent, and the law will inquire into the real delin-

quency and place the ultimate liability upon him whose fault was the primary cause of the injury.' "

Appellant, at page 65 of his Brief, cites the case of *Massachusetts Bonding & Insurance Co. vs. Dingle-Clark*, 52 N.E. (2d) 340, 142, Ohio St. 346. In this case, the judgment in the former action was conclusive that the Steel Company had been actively negligent in failing to light a sump in a building. This was an ordinary case of joint tort-feasors, each contributing directly to the injury.

Appellant, at page 66 of his Brief, cites the case of *Atlanta Consolidated Street Ry. Co. vs. Southern Bell Tel. & Tel. Co.* (Cir. Ct. ND Ga.), 107 Fed. 874.

This case was decided in 1901 and it was held that the Street Railway Company was the active tort-feasor and could not recover from the Telephone Company.

The case of *Stabile vs. Vitullo*, 112 N.Y.S. (2d) 693, cited by Appellant at page 67 of his brief, involved a public hall broken stairway, and the Court said:

> "The third-party plaintiffs may not have a recovery over for a loss which they could have averted by the exercise of reasonable care.
>
> "In that case the owner had actual notice of the defect for a long time, and was in *pari delecto* with third party defendant."

See, also:

Ruping vs. Great A & P Co., 126 N.Y.S. (2d) 687.

The case of *Spaulding vs. Parry Navigation Co.*, (U.S. D.C. S.D. N.Y.) 90 Fed. Supp 564, cited by Appellant in his Brief at page 67, supports our position. See the quotation from *Moore* at page 565 of 90 Fed. Supp.

Falk vs. Crystal Hall, Inc., 105 N.Y. Supp. 2066, cited by Appellant in his Brief at page 68. The correct citation is "105 N.Y. Supp. (2d) 66."

The result obtained in that case was based on facts quite similar in nature to those in Stabile vs. Vitullo, supra, and are not otherwise involved in the present case.

Appellant, at page 69 of his Brief, cites the case of *Standard Accident Insurance Co. vs. Sanco Piece Dye Works*, 64 N.Y.S. (2d) 585.

In the above case the landlord was held to be a joint tort-feasor and hence could not recover either indemnity or contribution.